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EDITOR'S NOTE

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o. 84-5630-CFH
tatus: GRANTED

Title: Kathy Thomas, Petitioner
v.
Dorothy Arn, Superintendent, Ohio Reformatory for Women

ocketed:
eptember 20, 1984

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Stanley,Christopher D.

Counsel for respondent: Drake,Richard David

ntry	Date	Note	Proceedings and Orders
1	Sep 20 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
2	Nov 29 1984		DISTRIBUTED. January 4, 1985
4	Dec 6 1984	P	Response requested. (Due January 28, 1985 - NONE RECEIVED)
5	Feb 8 1985		Brief of respondent Dorothy Arn, Supt. in opposition filed.
6	Feb 14 1985		REDISTRIBUTED. March 1, 1985
8	Mar 4 1985		Petition GRANTED. Justice Powell CUT.
9	Apr 18 1985		Joint appendix filed.
10	Apr 22 1985		Brief of petitioner Kathy Thomas filed.
11	Jun 4 1985		Record filed.
12	Jun 12 1985		Record filed.
13	Jun 12 1985		Certified original record, 5 volumes, received.
14	Jun 14 1985		Brief of respondent Dorothy Arn, Supt. filed.
15	Jul 18 1985		SET FOR ARGUMENT, Monday, October 7, 1985. (1st case)
16	Aug 7 1985		CIRCULATED.
17	Oct 7 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984 5

NUMBER_____

KATHY THOMAS

Petitioner

vs

DOROTHY ARN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHRISTOPHER D. STANLEY
902 Rockefeller Building
Cleveland, Ohio 44113
(216) 861-1409
COUNSEL FOR PETITIONER

STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USCS 2253

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 USCS 636(b)(1)(B)

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendation as provided by rules of court . . .
>
> (emphasis added)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NUMBER_____

KATHY THOMAS

Petitioner

vs

DOROTHY ARN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Kathy Thomas, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals, for the Sixth Circuit, entered in the above captioned case on June 25, 1984.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's Motion for Rehearing, (Thomas vs Arn), is unreported and is reproduced in the Appendix, Page A-1. The decision of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court of Ohio is reported: Thomas vs Arn, __F2d__ (1984) and is reproduced in the Appendix, page A-2.

The decision of the United States District Court of Ohio dismissing the Petition for Writ of Habeas Corpus (Thomas vs Arn), is unreported and is reproduced in the Appendix, page A-6. The Report and Recommendation of

the Magistrate filed in this case is unreported and is reproduced in the Appendix, page A-[illegible]

The decision of the Ohio Supreme Court reinstating the Petitioner's conviction is reported: State vs Thomas, 66 O St 2d 518 (1981) and is reproduced in the Appendix, Page A-33. The decision of the Court of Appeals of Ohio, Eighth District, is reported: State vs Thomas, 17 O Op 2d 397 (1980) and is reproduced in the Appendix, page A-[illegible]. The Judgment of the Court of Common Pleas, Cuyahoga County, finding the Petitioner guilty is unreported and is reproduced in the Appendix, page A-52

JURISDICTION

The Order of the United States Court of Appeals, for the Sixth Circuit, denying the Petitioner's Motion for Rehearing was entered on June 25, 1984. The jurisdiction of this Court is invoked under 28 USCS 2101.

QUESTIONS PRESENTED

(1) Should this Court resolve the conflict between the Circuits on the question of whether the failure to file objections to a Magistrate's Report constitutes a waiver of the right to appeal?

(2) Is the ruling by the United States Court of Appeals for the Sixth Circuit that the failure to file objections to a Magistrate's Report constitutes a waiver of the right to appeal the District Court's order a correct interpretation of the Federal Magistrate's Act, 28 USC 631 et seq.?

(3) Was the Petitioner denied her right to appeal which is guaranteed by 28 USCS 2253 and the due process clause of the Fourteenth Amendment to the United States Constitution by the ruling of the United States Court of Appeals for the Sixth Circuit that she had waived her right of appeal by failing to file objections to the Magistrate's Report?

(4) Was an injustice done to the Petitioner by the ruling of the United States Court of Appeals for the Sixth Circuit that she had waived her right to appeal where the record clearly shows she never intentionally waived her right to appeal?

STATEMENT OF THE CASE

On January 12, 1978, in Euclid, Ohio, the Petitioner Kathy Thomas shot and killed her common law husband Reuben Daniels. The police were immediately called and the Petitioner was arrested and charged with Murder. At all times relevant to this case, the Petitioner alleged that she acted in self defense.

The Cuyahoga County Grand Jury indicted the Petitioner for Murder and at the arraignment she plead Not Guilty. At trial, the Petitioner admitted killing her common law husband, but she contended she did so in self defense. "The evidence at trial established that the decedent was a violent man who had beaten Thomas on a number of occasions, including just before the shooting." Thomas vs Arn, __F2d__, 1984.

In support of her defense, the Petitioner attempted to introduce the testimony of an expert on battered women. The purpose of this testimony was to explain to the jury the "battered wife" syndrome which was essential to the jury's understanding of her claim of self defense. The Trial Court refused to allow this testimony and the Petitioner was ultimately convicted of Murder. On appeal, the Court of Appeals, Eighth District, reversed the Petitioner's conviction, holding in the syllabus, that:

> "Where a woman charged with the murder of her spouse presents evidence of an ongoing battering situation and asserts self defense as justification of the homicide, the defense is entitled to present expert testimony on the unique state ofmind of the battered woman. Such testimony is permitted to afford the jury an understanding of the defendant's state of mind at the time she committed the homicide because the subject of battered woman, and especially her unique psychological characteristics and differences in reaction and perception, is not one within the knowledge and comprehension of the average person"
>
> State vs Thomas
> 17 O Op 2d 297 (1980)

The State appealed and the Ohio Supreme Court reversed the Court of Appeals holding in its syllabus, that:

> Expert testimony on the "battered wife syndrome" proffered to support a defendant's claims of self defense to killing her husband is inadmissable in evidence where (1) it is irrelevant and immaterial to the issue of whether defendant acted in self defense at the time of the shooting, (2) the subject of the expert testimony is within the understanding of the jury, (3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise, and (4) its prejudicial impact outweighs its probative value.
>
> State vs Thomas
> 66 O St 2d 518 (1981)

The Petitioner then filed a Petition for Writ of Habeas Corpus and a lengthy Memorandum in support thereof. The United STates District Court of Ohio, LEastern Division, raising among other issues, the refusal of the trial court to allow the defense expert witness to testify. The petition was referred to the Magistrate who issued a Report recommending that the petition be denied. No objections were filed by Petitioner's counsel to said report. The district judge subsequently wrote a full opinion denying the Petition for Writ of Habeas corpus.

The Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit, raising as her only issue the refusal of the trial court to allow the defense expert witness to testify. The United States Court of Appeals for the Sixth Circuit, ruled that the Petitioner had waived her right to appeal because no objections were filed to the Magistrate's Report, and thereby the Court affirmed the district court's dismissal of the petition for a Writ of Habeas Corpus, although the concurring judge wrote as follows:

> In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome" impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial. Mannino vs International Manufacturing Co., 650 F 2d 846 (6th Cir. 1981); Bell vs Arn, 536 F 2d 123 (6th Cir. 1976). There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women. See, e.g., Report From the Attorney General and Task Force on lDomestic Violence (1978). Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners. Ascertaining a battered woman's state of mind is crucial to a determination of this and other aspects of her behavior. It may bear on the responsibility or lack of it, for her response. In my opinion the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge. The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

The Petitioner filed a Motion for Rehearing with the United States Court of Appeals for the Sixth Circuit, but it was denied on June 25, 1984. The Petitioner is now before this Court seeking review of the ruling by the Court of Appeals that she waived her right to appeal by the failure to file objections to the Magistrate's Report.

REASONS FOR GRANTING THIS WRIT

I. THE POLICY OF THE SIXTH CIRCUIT COURT OF APPEALS THAT A PERSON WAIVES THEIR RIGHT TO APPEAL BY FAILING TO FILE OBJECTIONS TO A MAGISTRATE'S REPORT WHICH THEY APPLIED TO THE PETITIONER'S CASE IS IN DIRECT CONFLICT WITH THE OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE AND IS CLEARLY AN INCORRECT INTERPRETATION OF THE FEDERAL MAGISTRATE'S ACT, 28 USC 631 et seq.

The issue before this Court is the correct interpretation of the Federal Magistrate's Act, 28 USC 631, et seq and whether the failure to file objections to a Magistrate's Report constitutes a waiver of the right to appeal a district court's order. Under 28 USC 636 (b)(1)(B) (Supp V 1981) a judge may designate a magistrate to submit proposed findings of fact and recommendations concerning certain aspects of a case. The statute provides:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

In United States vs Walters, 638 F 2d 947 (1981), the Sixth Circuit Court of Appeals adopted the policy based upon its interpretation of the above quoted section of the Federal Magistrate's Act, that the failure of a party to file objections to a Magistrate's Report constituted a waiver of that party's right to appeal a district court's order. The Sixth Circuit applied this policy to the Petitioner's appeal and ruled that she had waived her right to appeal because no objections to the Magistrate's Report were filed. Accordingly, the Court affirmed the dismissal of the Petition for Writ of Habeas Corpus.

The other Circuits which have considered this issue have all rejected the reasoning of the Sixth Circuit Court of Appeals and have held that the failure of a party to file objections to a Magistrate's Report does not constitute a waiver of the praty's right to appeal. See Britt vs Simi Valley, 708 F 2d 452 (9th Cir. 1983), Lorin Corp. vs Goto and Co. 700 F 2d 1202 (8th Cir., 1983); Nettles vs Wainwright, 657 F 2d 404 (5th Cir., 1982) (en banc) (Unit B). The reasoning of these cases is persuasive.

The interpretation by the Sixth Circuit Court of Appeals of the Federal Magistrate's Act is clearly wrong and the interpretation of the other circuits is clearly correct for the following reasons: (1) The language of the statute ("any partymay serve and file written objections") does not indicate that the failure to file objections will constitute a waiver of the right to appeal; (2) There is no indication elsewhere particularly the legislative history or the Congressional Record, that the failure to file objections should constitute a waiver of the right to appeal; (3) Congress did not include such a waiver provision in the statute.

This Court should accept this case and resolve the conflict between the Circuits.

II. THE SIXTH CIRCUIT COURT OF APPEALS RULING THAT THE FAILURE TO FILE OBJECTIONS TO A MAGISTRATE'S REPORT CONSTITUTES A WAIVER OF THE RIGHT TO APPEAL VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHT TO APPEAL.

Congress specifically gave to persons who have had their Petitions for Writ of Habeas Corpus denied the right to appeal. See 28 USC 2253. Where the right to appeal is legislatively granted, the due process clause prohibits any violation of that right. See Griffin vs Illinois, 351 US 12 (1956) Burns vs Ohio, 360 US 252 (1959).

In the instant case, the policy of the Sixth Circuit that the failure to file objections to a Magistrate's Report constitutes a waiver of the right to appeal unduly infringed upon the Petitioner's constitutionally guaranteed right to appeal and this Court must accept this case to protect the sanctity of the congressionally granted right to appeal enunciated in 28 USC 2253.

III. THE RECORD IN THE INSTANT CASE REVEALS THAT KATHY THOMAS NEVER INTENTIONALLY WAIVED HER RIGHT TO APPEAL.

The ruling by the Sixth Circuit Court of Appeals that Kathy Thomas waived her right to appeal has no basis in fact or in the record. She has at all points in her case sought review of the decision of the trial court denying her the right to call her expert witness. This Court is the sixth court she has been to. The issue has been briefed extensively. Such conduct hardly constitutes a waiver. This Court has defined waiver as follows:

> "Waiver is generally defined as an intentional relinquishment or abandonment of a known right or privilege and courts should indulge in every reasonable presumption, arising from the particular facts and circumstances of the case, that weighs against any waiver of fundamental constitutional rights."
>
> Johnson vs Zerbst
> 304 US 458 (1938)

At no time has Kathy Thomas abandoned her rights. She has gone to six courts to get her rights enforced. It is inconceivable that such conduct could be considered a waiver by the Sixth Circuit.

Further, Kathy Thomas should not be punished for something her lawyer failed to do. This Court must accept this case and correct the injustice that has been done to Kathy Thomas.

CONCLUSION

The Petitioner's right to appeal the District Court's denial of her Petition for Writ of Habeas Corpus has been unfairly taken away from her. This Court must accept this case, reverse the Court of Appeals and order them to consider the Petitioner's appeal on its merits.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

(6)

NUMBER_____

KATHY THOMAS

Petitioner

vs

DOROTHY ARN

Respondent

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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COUNSEL FOR PETITIONER

FILED

JUN 25 1984

JOHN P. HEHMAN, Clerk

NO. 83-3095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATHY THOMAS,
Petitioner-Appellant

v.

ORDER DENYING PETITION
FOR REHEARING

DOROTHY ARN,
Respondent-Appellee

Before: MERRITT and JONES, Circuit Judges; and JOHNSTONE, District Judge

Upon consideration of the petition for rehearing filed herein by the petitioner-appellant, the Court concludes that the question addressed in the petition for rehearing was fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Court

* The Honorable Edward Johnstone, United States District Court Judge for the Western District of Kentucky, sitting by designation.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-3095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KATHY THOMAS, *Petitioner-Appellant*, v. DOROTHY ARN, *Respondent-Appellee*. | ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern District.

Decided and Filed March 9, 1984

Before: MERRITT and JONES, Circuit Judges; and JOHNSTONE, District Judge*

JOHNSTONE, District Judge, delivered the opinion of the Court, in which MERRITT, Circuit Judge, joined. JONES, Circuit Judge, (p. 4) filed a separate concurring opinion.

JOHNSTONE, District Judge. Petitioner, Kathy Thomas, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for post conviction relief from her Ohio murder conviction for the death of her common law husband, Reuben Daniels. At her trial, Thomas alleged that she shot him in self defense. The

* Honorable Edward Johnstone, United States District Court Judge for the Western District of Kentucky, sitting by designation.

evidence at trial established that the decedent was a violent man who had beaten Thomas on a number of occasions, including just before the shooting. In support of her defense, Thomas attempted to offer the testimony of a social worker as an expert witness on "battered wife syndrome." The trial court voir dired the witness, found him unqualified, and held his testimony inadmissable.

On appeal, the Ohio Court of Appeals reversed Thomas's conviction on this issue; however, this ruling was overturned by the Ohio Supreme Court and her conviction reinstated. *State* v. *Thomas*, 17 O.Op.2d 397 (Ohio App. 1980), *reversed*, 66 O.St.2d 518 (Ohio 1981). Thomas exhausted all state relief before filing her petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division.

Thomas's petition was referred to a magistrate under 28 U.S.C. § 636(b)(1)(B). The magistrate filed his report and recommended that the petition be denied on May 11, 1982. Title 28 of the United States Code, Section 636(c), provides that Thomas had ten days within which to file written objections, if any, to the magistrate's report. Thomas, represented by counsel, filed a motion for an extension of time to file objections to the report. The motion was granted and Thomas given until June 15, 1982. Thomas, however filed no objections. On September 3, 1982, the district court, Contie, J., considered the record *de novo* and the recommendation of the magistrate. The court denied the petition of Thomas for a writ of habeas corpus on the same grounds enunciated by the magistrate. From this judgment Thomas filed a timely notice of appeal.

Jurisdiction over the parties and subject matter is appropriate pursuant to 28 U.S.C. § 2241. The court, however, faces the threshold issue raised by the respondent of whether Thomas waived her right to appeal due to her failure to file objections to the report and recommendation of the magistrate.

In *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981), this court held that ". . . a party shall file objections [to a magistrate's report] with the district court or else waive right to appeal." *Id.* at 950. *But see Britt* v. *Simi Valley Unified School District*, 708 F.2d 453, 454 (9th Cir. 1983). The holding in *Walters*, announced over a year before the report in this case was filed, was given prospective application, and accordingly, is applicable to this action. As required by *Walters*, the report at issue here contained a warning to the parties that failure to file objections within ten days would result in a waiver of the right to appeal the judgment of the district court.

Careful examination of the record reveals that Thomas failed to file written objection to the report and recommendation of the magistrate that her habeas corpus petition be dismissed by the district court. Under such circumstances, Thomas waived further appeal as compelled by this court's interpretation of 28 U.S.C. § 636(b)(1) in *United States* v. *Walters*, 638 F.2d 947. Accordingly, the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, dismissing this petition for a writ of habeas corpus is AFFIRMED.

JONES, Circuit Judge, concurring. I concur in the outcome of this case because, as the majority concludes, *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981) bars Kathy Thomas' right to appeal. I write separately to note that if I were to reach the merits of this case I would grant the writ of habeas corpus. In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome "impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial. *Mannino* v. *International Manufacturing Co.*, 650 F.2d 846 (6th Cir. 1981); *Bell* v. *Arn*, 536 F.2d 123 (6th Cir. 1976). There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women. *See, e.g., Report From the Attorney General & Task Force on Domestic Violence* (1978). Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners. Ascertaining a battered woman's state of mind is crucial to a determination of this and other aspects of her behavior. It may bear on the responsibility or lack of it, for her response. In my opinion the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge. The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

(5)

CONTIE, J.

SEP 3 1 02 PM '82

CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO.
AKRON

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

KATHY THOMAS Petitioner	)	Civil Action C81-1517A
vs.	)	ORDER
DOROTHY ARN, SUPT., et al. Respondents	)	

Before the Court is petitioner Kathy Thomas' action for habeas corpus relief pursuant to 28 U.S.C. §2254. The petitioner lists four grounds for relief: 1) the refusal of the trial court to allow the testimony of an expert witness concerning the "battered wife syndrome" was a denial of a fair trial and the right to compulsory process; 2) the failure of the trial court to instruct on the lesser included offense of voluntary manslaughter was a denial of due process; 3) the refusal by the trial court to allow counsel to voir dire potential jurors concerning their attitudes about battered wives was a denial of a fair trial; and 4) the prosecutor's suppression of exculpatory evidence was a denial of due process.

By Order this Court referred this matter to a United States Magistrate for his report and recommendation on July 29, 1981. The Magistrate filed his report and recommended disposition on May 11, 1982. The Magistrate

(6)

recommends that Kathy Thomas' petition be denied with regard to all four listed grounds for relief. The petitioner filed a motion for extension of time to file objections to the Magistrate's report and recommendation. This motion was granted and the petitioner was given until June 15, 1982. The petitioner, however, has failed to file objections.

The petitioner shot her common law husband, Rueben Daniels, in the head and the arm and killed him. She was convicted of murder by a jury and was sentenced to 15 years to life imprisonment. The petitioner claimed at trial that she shot Mr. Daniels in self-defense.

In support of this claim of self-defense, the petitioner presented evidence that she had been beaten and abused by her common-law husband in the past and that she shot her husband during the course of or after a heated fight.

In support of this claim, the petitioner attempted to present the testimony of expert witnesses concerning the "battered wife syndrome." The trial court conducted a voir dire examination of the petitioner's proposed experts and found that the "battered wife syndrome" was within the jury's understanding and that such testimony was irrelevant to the issue of self-defense.

The petitioner appealed her conviction asserting 17 assignments of error and the Ohio Court of Appeals reversed and ordered a new trial on the basis that the trial court erred in not allowing petitioner's experts to testify concerning the "battered wife syndrome." The prosecutor appealed to the Supreme Court and after full consideration, Ohio's highest court held that:

> Expert testimony on the "battered wife syndrome" proffered to support a defendant's claims of self-defense to killing her husband is inadmissible evidence where 1) it is irrelevant and immaterial to the issue of whether [the] defendant acted in self-defense at the time of the shooting; 2) the subject of the expert testimony is within the understanding of the jury; 3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and 4) its prejudicial impact outweighs its probative value.

State v. Thomas, 66 Ohio St. 2d 518 (1981).

I. The "battered wife syndrome"

Petitioner contends that the trial court and the Ohio Supreme Court's reasoning concerning the admissibility of the expert testimony regarding the "battered wife syndrome" is faulty. The petitioner also contends that the question before this Court is simply whether or not this evidence is admissible. Further, the petitioner argues that this evidence was admissible because: (a) the "battered wife syndrome" is beyond the common knowledge of jurors; (b) the subject has been sufficiently studied to qualify as a subject requiring expert testimony; (c) the testimony was critical to petitioner's defense (in terms of explaining how petitioner could be able to predict an explosion of aggression and in explanation of why the petitioner might remain living with the deceased after receiving beatings); and (d) to dispel any myths associated with the "battered wife syndrome."

As a matter of evidentiary law in Ohio, the Ohio Supreme Court has stated in this case that expert testimony

concerning the "battered wife syndrome" is not admissible evidence. This state court evidentiary ruling may not be questioned in a federal habeas corpus proceeding unless it raises a federal constitutional question. Bell v. Arn, 536 F.2d 128 (6th Cir. 1976). "Where there is no question concerning a federally significant external event such as the voluntariness of a confession or the knowing use of perjured testimony, trial court rulings on the admissibility of evidence may not be quesitoned in a federal habeas corpus proceeding." Chavez v. Dickson, 280 F.2d 727, 736, cert. denied, 364 U.S. 934 (cited with approval in Bell v. Arn, supra). The Court finds, therefore, that it is not sufficient that the evidence be admissible to be a cognizable claim in a habeas corpus petition. To be violative of due process, the failure to receive evidence must impinge on the fundamental fairness of the entire trial.

In the present case, the Court cannot find that the failure to receive expert testimony ccncerning the "battered wife syndrome" impugned the fairness of the petitioner's trial. Evidence concerning the petitioner's abuse by the decedent was received in detail via the testimony of the petitioner and other witnesses. The effect that these beatings had on the petitioner in her claim of self-defense, therefore, was clearly submitted to the jury for their consideration. Second, the voir dire of the experts' testimony did not establish a nexus between such testimony and the particular facts of petitioner's situation. See State v. Thomas, 66 Ohio St. 2d 518, 519, n.1 (1981). Third, the voir dire examination did not establish,

via a hypothetical question or otherwise, a nexus between such testimony and petitioner's claim of self-defense. The Court finds, therefore, that the petitioner has failed to assert or establish a constitutional error concerning the Ohio Supreme Court's evidentiary ruling under Ohio law. The Court agrees with the Magistrate's report, therefore, that petitioner's first ground for relief is without merit.

II. Jury Instruction on the Lesser Included Offense of Voluntary Manslaughter.

The trial court informed counsel that it would give jury instructions concerning the elements of murder, voluntary manslaughter and self-defense. Defense counsel objected, however, asserting that voluntary manslaughter was not a lesser included offense of murder under Ohio law. At that time, State v. Toth, 52 Ohio St. 2d 206 (1977) stated that an element of voluntary manslaughter to be proved by the prosecutor beyond a reasonable doubt was extreme emotional distress. Subsequent to petitioner's trial, however, the Ohio Supreme Court refused to follow its decision in Toth and held that extreme emotional distress is not an element of voluntary manslaughter but rather is a mitigating factor. State v. Muscatello, 55 Ohio St. 2d 201 (1978). Based on this case law, petitioner asserts that she was compelled to object to the trial court's proposed voluntary manslaughter instruction.

The trial court adhered to petitioner's objection and did not give the instruction concerning voluntary manslaughter. No objection was made by the defendant that such instruction should have been given. Petitioner now

asserts, however, that the trial court erred in failing to instruct the jury concerning the lesser included offense of voluntary manslaughter.

The petitioner asserts that there exists a due process right to have the jury instructed on lesser included offenses, citing Beck v. Alabama, 447 U.S. 625 (1980). In Beck, the Court stated:

> In federal courts it has long been beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.
>
> . . . .
>
> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Id. at 635, 637. The Court went on to hold "if the unavailability of a lesser included instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withholding the option from the jury in a capital case." Id. at 638. (emphasis added).

The Court does not find that the Beck case stands for the proposition that due process requires a lesser included offense instruction in all cases where there exists a risk of an unwarranted conviction. Beck was a case

dealing with capital punishment in which the Court recognized "as we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments." Id. at 637. The Seventh Circuit, however, has recently held that an allegation that the trial court failed to give a tendered voluntary manslaughter charge denies due process, states a cognizable habeas corpus claim. Davis v. Greer, 675 F.2d 141 (1982); See also Brewer v. Overberg, 624 F.2d 51, 52 (6th Cir. 1980), cert. denied, 449 U.S. 1085 (1981). Before dealing with this issue of whether the petitioner was denied the right to a fair trial, the Court finds that the "cause and prejudice" principles of Wainright v. Sykes, 433 U.S. 72 (1977), are applicable.

In light of the fact that the petitioner did not object to the failure of the trial court to instruct on voluntary manslaughter and that the petitioner requested that such instruction not be given, the petitioner must show both "cause and prejudice" for her default in failing to object on the basis of this constitutional claim. Engle v. Isaac, _____ U.S. _____ 102 S.Ct. 1558 (1982). The Court rejects the petitioner's claim that the "cause" for her default in failing to request a voluntary manslaughter claim was the posture of Ohio law under State v. Toth, supra. In Engle v. Isaac, supra, the Court states:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not by-pass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a

> constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive state courts of this opportunity would contradict the principles supporting Sykes.

Id. at 1572-1573. As pointed out by the Magistrate, the petitioner should have been aware, at the time of her trial, of the argument in favor of requiring the trial court to instruct on a lesser included offense. Indeed, the court of appeals in State v. Muscatello, 57 Ohio App. 2d 231 (1977) aff'd 55 Ohio St. 2d 201 (1978), had already accepted this argument. Instead of asserting this argument, however, the petitioner objected when such an instruction was proposed by the trial court. The Court finds, therefore, that no "cause" exists for petitioner's failure to request an instruction on the lesser included offense of voluntary manslaughter.

III. Voir Dire of Potential Jurors Regarding The "Battered Wife Syndrome."

The petitioner asserts that it is imperative to a fair trial to uncover juror biases against battered wives and self-defense. She asserts, therefore, that it was error for the court to prevent such voir dire questioning.

The scope and procedure followed in the voir dire examination of prospective jurors is a question of state procedural law. Ohio R. of Crim. P. 24(A). As pointed out by the Magistrate, this Court is bound by a state court's interpretation of its own procedural rules. Brewer v. Overberg, 624 F.2d 51 (6th Cir. 1980), cert. denied, 449 U.S. 1085 (1981). Further, petitioner has not proffered any substantial indications of the likelihood of prejudice so as

to elevate this claim to "constitutional dimensions." Cf. Rosales-Lopez v. United States, 451 U.S. 182 (1981). We cannot find, therefore, that the trial court abused its discretion in controlling the voir dire examination of potential jurors in violation of the federal constitution.

IV. Prosecutor's Suppression of Favorable Evidence.

Finally, the petitioner asserts that she has been denied due process on the basis that the prosecutor has failed to disclose exculpatory evidence. The petitioner asserts the following: 1) in a motion for discovery, she requested that the prosecutor disclose all favorable evidence; the prosecutor responded by providing the petitioner with a list of witnesses it intended to call; specifically, the prosecutor listed as witnesses William Sanders and Ernestine Chambliss; these two witnesses were not called by petitioner allegedly for two reasons: (a) their reliability was questionable because they were listed on the prosecutor's witness list, and b) Sanders was under indictment; during closing argument the prosecutor commented about petitioner's failure to call these two witnesses; finally, the petitioner learned that the two witnesses provided police with written statements which included exculpatory evidence. Based on this information, the petitioner filed a motion for a new trial. A hearing was held on this matter and the trial court denied the motion concluding that no miscarriage of justice occurred inasmuch as the petitioner had access to the exculpatory information prior to trial. Petitioner now asserts that

this writ should be granted under the authority of United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); and Giglio v. United States, 405 U.S. 150 (1972).

Reviewing the transcript of the hearing on the motion for a new trial, the trial court was presented with a credibility choice. Witness Sanders testified that he mentioned to defense counsel before trial that he had given a written statement to the police. Also, an assistant prosecutor testified that the subject-matter statements were contained in materials that were turned over to defense counsel pursuant to the trial court's pretrial discovery order. Defense counsel, however, testified that he first became aware of these statements after trial. The trial court made its credibility choice in favor of the prosecutor concluding that these statements could have been discovered and produced at trial with reasonable diligence.

Under authority of Sumner v. Mata, 449 U.S. 539 (1981), this Court must presume that this finding is correct unless the petitioner can establish the existence of one of seven circumstances. In this case, the petitioner neither asserts nor establishes the existence of any of the circumstances outlined in Sumner v. Mata, supra at 544-545. The Court also finds that the trial court's finding regarding this credibility choice is fairly supported by the record. Id. Further, the Court finds that based on this finding, due process was not violated in that the petitioner received a fair trial. The petitioner had an opportunity to discover and present said exculpatory evidence to the jury. See

Smith v. Phillips, ____ U.S. ____, 102 S.Ct. 940, 946-948 (1982).

CONCLUSION

Upon review of the entire record de novo, as well as the Magistrate's report and recommended disposition, the Court finds that an evidentiary hearing is not necessary and that petitioner's claims for habeas corpus relief are without merit. Accordingly, the Court hereby denies the petition of Kathy Thomas for a writ of habeas corpus.

IT IS SO ORDERED.

Leroy J. Contie, Jr.
U. S. Circuit Judge

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

CASE NO. 84-5830

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KATHY THOMAS,

Petitioner,

v.

DOROTHY ARN, Superintendent,
Ohio Reformatory for Women,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

WHETHER, CONSISTENT WITH THE FEDERAL MAGISTRATES ACT, A CIRCUIT COURT MAY CONDITION APPELLATE REVIEW UPON THE FILING OF OBJECTIONS TO THE RECOMMENDATION OF THE MAGISTRATE.

PARTIES

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court, all parties to this action are listed in the caption of the case.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
CONSISTENT WITH THE FEDERAL MAGISTRATES ACT, A CIRCUIT COURT MAY CONDITION APPELLATE REVIEW UPON THE FILING OF OBJECTIONS TO THE REPORT OF THE MAGISTRATE.	
CONCLUSION	11
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

Cases	
Engle v. Isaac, 456 U.S. 107 (1982)	10
Patterson v. New York, 432 U.S. 197 (1977)	9,10
State v. Thomas, 17 Ohio Ops. 3rd 397 (1980)	1,6
State v. Thomas, 46 Ohio St. 518, 423 N.E. 2d 137 (1981)	1,6
Thomas v. Arn, 728 F. 2d 813 (6th Cir. 1984)	1,5
United States v. Schronce, 727 F. 2d 91 (6th Cir. 1984) cert. denied, ____ U.S. ____, 104 S. Ct. 2395, 81 L. Ed. 2d 352 (1984)	8
United States v. Walters, 638 F. 2d 947 (6th Cir. 1981)	7

TABLE OF AUTHORITIES
(Cont.)

	PAGE
Statutes	
28 U.S.C. Section 2254(b)(1)	2,7
28 U.S.C. Section 2254	5
28 U.S.C. Section 2241	10
Section 2903.02, Ohio Revised Code	4
Constitutional Provisions	
Section 1, Amendment XIV, Constitution of the United States	3

CASE NO. 84-5630

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KATHY THOMAS,

Petitioner,

v.

DOROTHY ARN, Superintendent,
Ohio Reformatory for Women,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Thomas v. Arn, 728 F. 2d 813 (6th Cir. 1984). The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, and the report and recommendation of the magistrate are unreported.

The opinion of the Supreme Court of Ohio is reported as State v. Thomas, 66 Ohio St. 2d 518, 423 N.E. 2d 137 (1981). The opinion of the Ohio Court of Appeals for the Eighth Judicial District is reported as State v. Thomas, 17 Ohio Ops. 3rd 397 (1980).

JURISDICTION

The decision of the United States District Court for the Northern District of Ohio, Eastern Division, was issued on September 3, 1983. The decision of the United States Court of Appeals for the Sixth Circuit was issued on March 9, 1984 and the order denying rehearing was issued on June 25, 1984. Jurisdiction is alleged pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves 28 U.S.C. Section 636(b)(1) which provides in pertinent part:

> (A)[A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B)[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact, and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

> (C)[T]he magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

Petitioner Kathy Thomas is presently in the custody of respondent Dorothy Arn, Superintendent of the Ohio Reformatory for Women at Marysville, Ohio. Petitioner is held in custody by virtue of journal entries of commitment in State v. Thomas, Case Nos. CR-37171 and CR-52801.[1]

Petitioner was indicted by the Cuyahoga County, Ohio Grand Jury, January Term, 1978, on one (1) count of murder in violation of Ohio Revised Code Section 2903.02 resulting from the shooting death of her common-law husband. Petitioner was tried before a jury which found her guilty as charged. The trial court subsequently sentenced her to a term of from fifteen (15) years to life imprisonment. [Case No. CR-37171]

Petitioner perfected a timely appeal as of right to the Ohio Court of Appeals for the Eighth Judicial District. In a split decision, the intermediate appellate court held that the trial court had erred in excluding testimony concerning the psychological characteristics of battered women. The appellate court reversed and remanded for a new trial. State v. Thomas, 17 Ohio Ops. 3rd 397 (1980).

The Supreme Court of Ohio thereafter granted discretionary review. The sole issue raised by the State on appeal was "whether the trial court committed reversible error by excluding testimony on the subject of the 'battered wife syndrome' by an expert on battered wives, where defendant pleaded self-defense to killing her husband". The Supreme Court of Ohio rule that:

> Expert testimony on the "battered wife syndrome" by a psychiatric social worker to support defendant's claim of self-defense is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

State v. Thomas, 66 Ohio St. 518, 423 N.E. 2d 137 (1981). The Supreme Court therefore reversed the judgment of the Court of Appeals.

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[1] In Case No. CR-52801, Thomas was sentenced to a term of from two (2) to ten (10) years imprisonment for trafficking in drugs. This conviction and sentence is not challenged in the instant proceeding.

Petitioner thereafter filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Eastern Division. On July 30, 1981, then District Judge Leroy Contie, Jr. issued an order to show cause pursuant to the Rules Governing Section 2254 Cases. The case was referred to a United States Magistrate for report and recommendation. Respondent subsequently filed a return of writ addressing the allegations contained in petitioner's petition.

On May 11, 1982, the United States Magistrate filed a report and recommendation in which he advised that the petition for writ of habeas corpus be dismissed. Petitioner asked for and received an extension of time until June 15, 1982, in which to file objections to the report and recommendation. No objections, however, were ever filed. On September 3, 1982, District Judge Contie filed an opinion in which he found petitioner's grounds for relief to be without merit. He therefore, ordered that the petition be dismissed. Thomas v. Arn, Case No. C81-1517A.

Petitioner subsequently moved for leave to file a notice of appeal instanter pursuant to Rule 4(a)(5), Federal Rules of Appellate Procedure. On November 24, 1982, leave was granted to file a notice of appeal. A certificate of probably cause had previously been issued on September 14, 1982.

Subsequent to briefing and oral argument, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the district court's judgment. Thomas v. Arn, 728 F. 2d 813 (6th Cir. 1984). the circuit court held as follows:

> In United States v. Walters, 638 F. 2d 947 (6th Cir. 1981), this court held that "...a party shall file objections [to a magistrate's report] with the district court or else waive right to appeal." Id. at 950. But see Britt v. Simi Valley Unified School District, 708 F. 2d 453, 454 (9th Cir. 1983). The holding in Walters, announced over a year before the report in this case was filed, was given prospective application, and accordingly, is applicable to this action. As required by Walters, the report at issue here contained a warning to the parties that failure to file objections within ten days would result in a waiver of the right to appeal the judgment of the district court.

[Emphasis added]. On June 25, 1984, the circuit court denied rehearing. This action has ensued.

SUMMARY OF ARGUMENT

A federal circuit court may, consistent with the Federal Magistrates Act, condition appellate review upon the filing of objections to the report and recommendation of the magistrate where such report contains an express warning that the failure to file objections will result in the waiver of the right to appeal.

ARGUMENT

CONSISTENT WITH THE FEDERAL MAGISTRATES ACT, A CIRCUIT COURT MAY CONDITION APPELLATE REVIEW UPON THE FILING OF OBJECTIONS TO THE REPORT OF THE MAGISTRATE.

The Federal Magistrates Act, 28 U.S.C. Section 636(b)(1) provides in pertinent part that:

> (B) A judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) The magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

[Emphasis added].

In United States v. Walters, 638 F. 2d 947 (6th Cir. 1981) the United States Court of Appeals for the Sixth Circuit interpreted the Federal Magistrates Act as it applies to the requirement that objections be made to the report and recommendation of a federal magistrate. The Court held that "the fundamental congressional policy underlying the Magistrates Act - to improve access to the federal courts and aid the efficient administration of justice - is best served by our holding that a party shall file objections with the district court or else waive right to appeal." United States v. Walters, 638 F. 2d at 949-950.[2] The district courts within the Sixth Circuit's jurisdiction were ordered to thereafter inform the parties involved that failure to file objections within ten (10) days resulted in a waiver of the right to appeal. United States v. Walters, 638 F. 2d at 950.

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[2] The holding in United States v. Walters, supra was to be given prospective application. The report and recommendation in the instant case was filed on May 11, 1982, more than one year after the date of January 20, 1981 on which United States v. Walters was decided. Thus, there can be no question that the decision in United States v. Walters was appropriately applied to this case.

The United States Magistrate filed his report and recommendation, in which he advised dismissing the petition, on May 11, 1982. The report and recommendation contained the following express warning:

> ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See: United States v. Walters, 638 F. 2d 947 (6th Cir. 1981).

There can be no doubt that petitioner received and understood the above quoted warning as her attorney requested and was granted an extension of time in which to file the requisite objections. However, no objections were filed and no rationale for such failure was ever proffered.

The circuit court below does not stand alone in its interpretation of 28 U.S.C. Section 636(b)(1). In United States v. Schronce, 727 F. 2d 91 (4th Cir. 1984), cert. denied, ___ U.S. ___, 104 S. Ct. 1295, 81 L. Ed. 2d 352 (1984), the Fourth Circuit reasoned as follows:

> The legislative history of the Federal Magistrates Act reveals that Congress intended to give magistrates a significant role in the federal judicial system. The Act's main purpose, as stated explicitly in the committee reports, was to relieve district courts of specified judicial chores that could be separated from their article III responsibilities, in order to reduce increasingly unmanageable case loads. See Nettles v. Wainwright, 677 F. 2d 404 (5th Cir. 1982)(en banc)(Unit B). Neither the legislative history of the Act nor §636(b)(1) itself, however, specifically addresses the potential consequences a party will suffer if he fails to file the written objections authorized by the last paragraph of that subsection. We do not believe, though, that the Act can be interpreted to permit a party, such as Schronce, to ignore his right to file objections with the district court within imperiling his right to raise the objections in the circuit court of appeals. The Act's purpose and the framework Congress established to achieve that purpose would be defeated by such an interpretation. Litigants would have no incentive to make objections at the trial level; in fact they might even be encouraged to bypass the district court entirely, even though Congress has lodged the primary responsibility for supervision of federal magistrates' functions with that judicial body. Equally as troubling, the interpretation of §636(b)(1) Schronce urges would impose a serious incongruity on the district court's decision-making process--vesting it with the duty to decide issues based on the magistrate's findings but depriving it of the opportunity to correct those findings when the litigant has identified a possible error. The same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here.

727 F. 2d at 93-94. [Emphasis added][footnotes omitted]. The circuit court went on to emphasize that Schronce, like the petitioner herein, had been warned of the ramifications of his procedural default. The court stated:

> Schronce's arguments in this case would be more compelling if the posture of Schronce's appeal were caused by procedural ambush. That is not the case--the magistrate's recommendation was adequate to apprise Schronce that timely objection was necessary in order for Schronce to perfect his right of review.
>
> • • •
>
> This language was mandatory and clearly alerted Schronce to his procedural obligations.

727 F. 2d at 94.

Contrary to petitioner's assertion, the majority of circuit courts having considered the question presented herein have adopted the posture of the Sixth Circuit. In United States v. Schronce, supra., the Fourth Circuit correctly noted the respective circuit court positions as follows:

> Five circuit courts of appeals have considered the question of whether, by failure to file an objection within ten days, a party waives the right to raise on appeal the issues decided by the magistrate. Four courts have decided with slight variations that the failure to object bars appellate consideration. Nettles v. Wainwright, 677 F. 2d 404, 405, 408 (5th Cir. 1982)(en banc)(Unit B); United States v. Walters, 638 F. 2d 947, 950 (6th Cir. 1981); McCall v. Andrus, 628 F. 2d 1185, 1187 (9th Cir. 1980), cert. denied, 450 U.S. 996, 101 S. Ct. 1700, 68 L. Ed. 2d 197 (1981); Park Motor Mart, Inc. v. Ford Motor Co., 616 F. 2d 603, 605 (1st Cir. 1980). Only one circuit has reached the opposite conclusion. Lorin Corp. v. Goto & Co., Ltd., 700 F. 2d 1202 (8th Cir. 1983). Some of these decisions, including Lorin, emphasized that in order for a failure to object to constitute a waiver, it must be evident on the face of the magistrate's report that objections must be filed within 10 days.

727 F. 2d at 94 n. 4.

Finally, the instant case is a particularly inappropriate vehicle with which to resolve the question presented. The sole substantive issue is whether Ohio must, as a matter of constitutional imperative, allow the admission of evidence relative to the "battered wife syndrome".

A State is free to define crimes and the affirmative defenses to those crimes in the manner in which it considers best. Patterson v. New York, 432 U.S. 197 (1977). Ohio has made a reasoned judgment not to create a special affirmative defense open solely to

victims of spousal abuse. Such a determination falls within the power of a state to regulate its criminal justice system. No allegation has been made that Ohio has shifted the burden of proof to the defendant or that it declares a defendant presumptively guilty. Patterson v. New York, 432 U.S. at 210. Thus, petitioner's underlying allegation merely questions the application of Ohio law and does not raise a federal constitutional question.

Our system of government is one of federalism. "The States possess primary authority for defining and enforcing the criminal law." Engle v. Isaac, 456 U.S. 107, 128 (1982). A federal habeas court does not sit to review legitimate policy decisions made by the state courts. Rather, it is the function of a federal habeas corpus court to review alleged violations of federal constitutional rights. Petitioner's argument consists largely of tracts on the plight of battered women. This social tragedy is not, of course, to be denigrated or treated lightly. However, these studies and scholarly articles would be more appropriately submitted to the Ohio General Assembly as part of an effort to change Ohio's law on self-defense. These documents do nothing to establish a violation of a federal constitutional right. Simple disputes over questions of state law are not cognizable in a federal habeas corpus action. 28 U.S.C. Section 2241.

CONCLUSION

Wherefore, for the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief in Opposition to Petition has been forwarded to petitioner, Kathy Thomas, through the office of her counsel, Christopher D. Stanley, Attorney at Law, 902 Rockefeller Building, Cleveland, Ohio 44113, via the U.S. Mail, this 15th day of February, 1985.

RICHARD DAVID DRAKE
Assistant Attorney General

JOINT

APPENDIX

No. 84-5630

In the Supreme Court of the United States

OCTOBER TERM, 1984

KATHY THOMAS, PETITIONER

—vs—

DOROTHY ARN, Superintendent,
Ohio Reformatory For Women, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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CERTIORARI GRANTED MARCH 4, 1985

TABLE OF CONTENTS

	Page
Chronological List of Relevant Docket Entries	1
Trial Transcript of Cuyahoga County Court of Common Pleas (TR 1892-1903)	3
Court of Appeals of Cuyahoga County Opinion dated July 24, 1980	9
Ohio Supreme Court Opinion dated June 24, 1981	33
U.S. District Court for the Northern District of Ohio—	
—Report and Recommendation of Magistrate, dated May 11, 1982	37
—Court Order Denying Habeas Corpus Relief, dated September 3, 1982	51
—Judgment Entry dated September 3, 1982	60
U.S. Court of Appeals for the Sixth Circuit Opinion dated March 9, 1984	61
—Concurring Opinion dated March 9, 1984	64
—Order Denying Petition for Rehearing dated June 25, 1984	65
Supreme Court of the United States—Order Granting Certiorari and Leave to Proceed in Forma Pauperis	66

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7-28-81	1	PETITION for Writ of Habeas Corpus, filed
7-28-81	2	MEMORANDUM of LAW by petitioner in support of petition for writ of habeas corpus, filed.
7-29-81	3	ORDER referring action to office of the Clerk for reasignment to a United States Magistrate in the Eastern Division by random draw filed. Contie, J.
7-30-81	4	ORDER that the within action is referred to Mag. Laurie, FURTHER Mag. is to submit a written report containing proposed findings of fact and conclusions of law and a recommended disposition of the matter to this Court filed. Contie, J.
7-30-81	5	ORDER that respondent move or answer pursuant to the Rules Governing Section 2254 cases within 20 days of the date of this Order filed. Contie, J.
8-24-81	6	MOTION of respondent for extension of time to show cause why petition for writ of habeas corpus should not be granted to 9-8-81 with memorandum in support filed.
12-23-81	7	MOTION of respondent for leave to file Return of Writ instanter with memorandum in support and attachment filed.

DATE	NR.	PROCEEDINGS
12-28-81	8	ORDER granting respondent's motion for leave to file Return of Writ instanter filed. Laurie, M.
12-28-81	9	RETURN of writ of respondent filed. (With attachments).
2- 4-82	10	TRANSCRIPT of state court proceedings (5) volumes filed.
5-11-82	11	REPORT and recommendation of Magistrate filed. Laurie, M.
5-24-82	12	MOTION of petitioner for extension of time to file objections to report & recommendation of Magistrate filed.
5-28-82	—	ORDER granting motion to 6-15-82. Contie, J.
9- 3-82	13	ORDER denying the petition of Kathy Thomas for a writ of habeas corpus filed. Contie J.
9- 3-82	14	JUDGMENT Entry in favor of the respondent and against the petitioner filed. Contie J.
9-13-82	15	APPLICATION of petitioner for certificate of probable cause and notice of intention to appeal filed.
9-14-82	16	ORDER issuing the petitioner a certificate of probable cause filed. Contie, J.
11- 1-82	17	MOTION of petitioner for leave to file Notice of Appeal with attachment filed.
11-24-82	18	ORDER granting motion of petitioner for leave to file Notice of appeal filed. Dowd, J.
2- 7-83	19	AFFIDAVIT of Kathy Thomas to proceed in forma pauperis filed.
2- 7-83	—	ORDER granting motion. Dowd, J.
2- 8-83	20	NOTICE of appeal of petitioner filed.

TRIAL TRANSCRIPT—
CUYAHOGA COUNTY COURT OF COMMON PLEAS

[Jury Instruction Regarding Self-Defense, TR 1892-1903]

* * * *

We now come to the consideration of the elements or ingredients that go up to make the charge in this indictment.

Each and every one of which must be proven by the State of Ohio by evidence beyond a reasonable doubt.

The Defendant, Kathy Thomas, is charged with murder under Revised Code 2903.02. Murder is the causing of the death of another purposely.

Before you can find the Defendant, Kathy Thomas, guilty of murder,—that is plain murder—you must find beyond a reasonable doubt, number one, that Reuben Daniels was a living person, and that his death was caused by the Defendant in Cuyahoga County, Ohio on or about the 12th day of January, 1978; * * *

* * * *

The purpose with which a person does an act is known only to herself, unless she expresses it to others or indicates it by her conduct. The purpose with which a person does an act or brings about a result is determined in the manner in which it is done, the means, the weapon used, and all facts and circumstances in evidence as to how she performed the act.

If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life or inflict great bodily harm, the purpose or intent to kill or injure may infer from the use of the weapon.

The Court has used the term deadly weapon. A deadly weapon is an object or instrument which is capable of inflicting death. In determining whether the revolver was used as a deadly weapon, you, as a juror, will determine and consider this nature, its capability to be

used to inflict deadly harm, and the means in which you find it to be used in this case.

Where "unlawful" has been used, unlawful means contrary to law.

Proximate cause is an essential element of the crime of murder. Proximate cause is an act which, in a natural and continuous sequence, produces the result, and without which it would not have occurred. Proximate cause, as it exists in the death of Reuben Daniels, is the natural and probable effect or result of an act or acts of Kathy Thomas.

The proximate cause of the death of Reuben Daniels must be such as would naturally and logically and proximately result from the Defendant's actions, and these actions must have been such as would reasonably be anticipated by an ordinarily prudent person to likely result in such death.

Venue, that is where it occurred, is an essential element of the crime charged in the indictment of plain murder. Therefore, the State must show that the crime took place on or about the 12th day of January, 1978, here in Cuyahoga County, Ohio.

Now, there is a claim in this case of self-defense. What then is self-defense?

Now, if a person is assaulted by another who apparently intends to kill or cause great bodily harm, that person, as a result, is not required to retreat, but may repel force with force, and may kill her assailant, if it reasonably appears to the Defendant necessary to do so.

Under the law, while a person is exercising her right of self-defense, it may be said to be excusable or may be even said to be justifiable. If an act which would otherwise be criminal is done in self-defense, the self-defense excuses the unlawfulness of the act.

To constitute self-defense, ladies and gentlemen, there must have been on the part of Kathy Thomas a careful use of her faculties and reasonable grounds to honestly believe that she was in an immediate danger to her

person or to her life. There must have been a sufficient act by the deceased, Reuben Daniels, coupled with the apparent present ability to carry it out, to cause the Defendant, Kathy Thomas, to reasonably believe that the other party, that is Reuben Daniels, intended to kill her or do great bodily harm, and that the killing or shooting was necessary to save herself from death or great bodily harm.

Now, if the Defendant, Kathy Thomas, had reasonable grounds and an honest belief that she was in imminent danger of death or great bodily harm, and the only means of escaping such danger was injuring or killing her assailant, Reuben Daniels, she was justified in doing so, even though she was mistaken as to the existence of such danger.

Resort to use of a deadly weapon is not permitted, ladies and gentlemen, because of words. Vile or abusive language, or verbal threats, no matter how provocative, do not alone justify the use of a deadly weapon.

In determining whether a Defendant such as Kathy Thomas had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant, Kathy Thomas, with her characteristics, with her feelings, with the disparity of size between Daniels and the Defendant, Kathy Thomas, with her knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded her at the time the act was done. You must consider also the conduct of Reuben Daniels and determine if his act or words or whatever you find in the evidence caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm.

The law does not measure nicely the degree of force which may be used to repel an assailant or assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances, and if the force used is so grossly disproportionate to her apparent danger, as to show revenge or

evil purpose, to injure her assailant, or Reuben Daniels in this case, then the defense of self-defense is not available to that person, that is, Kathy Thomas.

The plea of self-defense also is not available to a person who starts an altercation or fight, unless in good faith she withdraws from the contest and informs the other party of her withdrawal; or by words or acts reasonably indicates that she has withdrawn and is no longer participating in the fight.

Self-defense is not available to a person if that person sought out trouble and, armed with a dangerous weapon, provoked the fight or altercation, or did not attempt to avoid or leave the scene of the trouble.

If in the careful, proper use of her faculties, the Defendant, Kathy Thomas, honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill her or do great bodily harm to her, then the Defendant, having notice of her adversary's position, was released from danger, and the right to use force in self-defense ended.

If thereafter a Defendant, such as Kathy Thomas, continues an altercation or a fight, she becomes the aggressor, and the subsequent injury or death of another, and in this case Reuben Daniels, is unlawful.

Now, in summary, as to self-defense of murder, to constitute plain murder, there must be a killing of another, or Reuben Daniels, and there must have been a specific purpose to cause the death of Reuben Daniels existing in the mind of the Defendant, Kathy Thomas, at the time of the act.

If you find, after considering all of the evidence, including that on the subject of self-defense, you are convinced that the State has proven each and every element of the crime of murder charged beyond a reasonable doubt, and in addition, you are convinced that the State has proven beyond a reasonable doubt that the Defendant did not act in self-defense, then your verdict must be guilty of plain murder as charged in the indictment.

The Court would indicate now that the Defendant has no burden whatsoever to prove self-defense. If the evidence fails to establish that the Defendant acted in self-defense, such failure does not create an inference that the Defendant is guilty of murder.

If, however, after consideration of all of the evidence, including that on the subject of self-defense, you are not convinced beyond a reasonable doubt either that the State has proven each and every element of the crime of murder, that in that instance you would find the Defendant not guilty; or you are not convinced that the State has proven beyond a reasonable doubt that the Defendant did not act in self-defense, then you must return a verdict of not guilty to the charge of plain murder.

Now, to be crystal clear, and in plain English, so that you would understand this, what I have just said, now it is the obligation and burden of the State to prove beyond a reasonable doubt every essential and material element of the crime charged, that is, before the Defendant, Kathy Thomas, may be found guilty, and that burden does not shift at any time to the Defendant, Kathy Thomas.

The Defendant is not obliged to prove by any weight of the evidence that she acted in self-defense in order that a killing may be found justifiable.

If the defense of self-defense is raised—and I have indicated it has been raised in the evidence—then the State of Ohio bears the burden of disproving such defense by evidence that convinces you beyond a reasonable doubt.

And if you find that the self-defense has not been so disproved by the State of Ohio by evidence beyond a reasonable doubt, then you must find for the Defendant, Kathy Thomas, and find her not guilty of murder.

Now, it is apparent, ladies and gentlemen, that the Court cannot outline in future short statements or in any particular order in the charge. You will construe all of

the materials that I have given you in the charge to together, and apply them to your findings from the evidence.

The Court has charged you the essential elements and ingredients that must be proven by the State beyond a reasonable doubt. That is plain murder, plain murder, and the elements of lack of self-defense, if you find that it has been raised by the evidence.

Once again, the Court would indicate to you, if the evidence fails to establish that the Defendant acted in self-defense, such failure does not create an inference that the Defendant is guilty of the offense charged.

If, however, after considering all of the evidence on plain murder, including that on the subject of self-defense, you are not convinced beyond a reasonable doubt either that the State has proven each and every element of the crime charged, or you are not convinced that the State has proven beyond a reasonable doubt that the Defendant did not act in self-defense, then you must return a verdict of not guilty for Kathy Thomas in this particular case.

If, however, after considering all of the evidence once more, including that on the subject of self-defense, you are convinced beyond a reasonable doubt that the State has proven each and every element of crime of plain murder, then your verdict must be guilty as charged of plain murder and against Kathy Thomas.

Now, gentlemen, would you like to approach the Bench.

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COURT OF APPEALS OF CUYAHOGA COUNTY

(Nos. 39698 & 40028—Decided July 24, 1980.)

[1700 3d 397]

STATE OF OHIO, PLAINTIFF-APPELLEE

v.

THOMAS, DEFENDANT-APPELLANT

Judgment reversed and cause remanded.

[Syllabus by the Court]

1. *Criminal Procedure* O.Jur 2d § 329. *Homicide* O.Jur 2d §§ 91, 140.

Where a woman charged with the murder of her spouse presents evidence of an on-going battering situation and asserts self-defense as justification of the homicide, the defense is entitled to present expert testimony on the unique state of mind of the battered woman. Such testimony is permitted to afford the jury an understanding of the defendant's state of mind at the time she committed the homicide because the subject of the battered woman, and especially her unique psychological characteristics and differences in reaction and perception, is not one within the knowledge and comprehension of the average person.

OPINION

KRENZLER, J. On February 13, 1978, the defendant-appellant Kathy Thomas, hereinafter referred to as the appellant, was indicted by the Cuyahoga County Grand Jury on one count of murder, in violation of R.C.

§ 2903.02. The indictment charged appellant with having unlawfully and purposely caused the death of Reuben Daniels, her common-law husband.

At her arraignment on March 3, 1978, appellant entered a plea of not guilty to the charge of murder.

On March 13, 1978, appellant filed a motion to dismiss the charges against her on the ground that she had been indicted by a grand jury consisting of only nine members, in violation of R.C. § 2939.02 and Sec. 1, Art. X, Ohio Constitution, requiring a 15 member grand jury.

On April 7, 1978, appellant filed a motion to suppress any oral or written statements made in violation of her Fifth, Sixth, or Fourteenth Amendment Rights.

On June 2, 1978, a hearing was conducted on appellant's motion to suppress, which related to four individual oral statements made by appellant on January 12 and January 13, 1978: (1) a tape recording of a telephone conversation between Euclid police and appellant; (2) appellant's statement made to an officer on the scene, without *Miranda* warnings; (3) a second statement given to a police officer at the scene, without *Miranda* warnings; and (4) a statement given by appellant, after consultation with her attorney, without *Miranda* warnings. At the conclusion of the hearing, appellant's motion to suppress was overruled.

A hearing was then conducted on appellant's motion to dismiss the indictment on the ground that the grand jury which had indicted appellant had not been constituted fairly, and had consisted of nine members only.

Appellant's two motions with regard to the composition of the grand jury were overruled, as were appellant's motion for a voir dire of the entire jury panel before the exercise of her peremptory challenges.

On June 5, 1978, a jury was impanelled and trial commenced on June 7, 1978.

Dr. Virginia Dolan, assistant pathologist, Cuyahoga County Coroner's Office, testified that, while performing the autopsy on Reuben Daniels, she found two gunshot

wounds, the first being an entrance wound on the left side of the forehead, where the bullet entered anteriorly and travelled from left to right and from the top of the head to the bottom. The second gunshot wound resulted from a bullet which had entered through the outer left arm, and travelled straight through the soft tissues of the arm.

Dr. Dolan further testified that Daniels was 25 years old, 225 pounds, 5′ 10″ tall; that morphine was found in Daniels' blood and urine; that she found a low blood level of valium; and that Daniels died as a result of the gunshot wound to his forehead, with perforation of his skull and brain. When asked whether Daniels was seated or standing at the time he was shot, given the fact that the bullet hole went through the left arm of the chair, that the bullet was found in the lower right area of the chair, and that the body was found seated in the chair with the arm overhanding the left arm of the chair, Dr. Dolan opined that Daniels was seated in the chair at the time he was shot.

Mary Cowan, medical technologist in charge of the Trace Evidence Department of the Coroner's Office, testified that tests indicated that the muzzle of the gun was, at minimum, two feet from the outermost part of the sleeve where the entrance wound was found; and that there was no indication that, on the day in question, Daniels had handled a gun with his right hand. The left hand was too blood-coated for valid testing.

Daniel McPeek, dispatcher for the Euclid Police Department, testified that, at 2:05 a.m., on January 12, 1978, he received a call from a female who identified herself as Kathy Thomas, and stated in a very calm and matter-of-fact voice that she had murdered her husband. The tape recording of the call was played for the jury.

Timothy Coy, Patrolman, Euclid Police Department, testified that, at 2:06 a.m., on January 12, 1978, he received a call to go to 27061 Sidney Avenue, Apt. 59, where a woman had just shot and killed her husband.

Coy and Patrolman William Horton arrived at the scene at 2:09 a.m., entered the apartment and observed in the living room area, a male slumped over in a chair with a wound to the left side of the head in the temple area. Coy, Lieutenant Lynch, and Detective Nebe entered the kitchen, at which time Lynch advised appellant of her constitutional rights. Appellant indicated that she understood those rights.

Coy further testified that Lynch asked appellant to briefly recount what had happened, and appellant responded as follows, according to Lynch's account: she stated that she and Daniels had argued that evening; that he became upset with her, struck her, pushed her from the kitchen into the living room, pushed her onto the couch, and then turned away from her and sat down on a chair. Appellant then picked up the revolver from the couch, walked over to the chair in which Daniels was seated, and fired the gun at Daniels twice.

Coy stated that, inasmuch as he was assigned to take the basic incident report which involved more in-depth information, he asked appellant if she would recount for him what had occurred on that evening. Appellant told Coy that she had been living with Daniels for approximately two years; that he had assaulted her on several occasions, the most recent assault having occurred four days earlier when Daniels struck appellant with a pistol; and that, later in the week, another argument took place, at which time Daniels struck her several times. Appellant further stated that, on the evening in question, the fish she had placed in the oven caught fire; that Daniels became upset and shouted and swore at her; that he slapped her and pushed her into the dining room and onto the couch; that he then walked away from her and was about to sit down in a chair when she picked up a gun from the couch, came around from the coffee table, pointed the gun at Daniels, and said, "This is it" or "I've had enough," and as Daniels turned, she shot him twice and he fell back into the chair.

Coy stated that appellant appeared calm and composed at the scene; that she had bruises under her right eye; and that, after she was taken to the police station, she complained of sore ribs, at which time she was taken to a hospital and examined by a physician.

Craig Hayes, resident of the Willow Arms Apartments, 27041 Sidney, testified that, at 2:00 a.m., on January 12, 1978, appellant and Ernestine Sanders came to his apartment to use the telephone in order to call the police; that appellant told him that she had just killed "2," as Daniels was known by his nickname; that appellant was almost hysterical and had bruises on her face. Hayes stated that it was not unusual to see bruises on appellant's face. At this point, Hayes became the court's witness, and the court cross-examined him with regard to Daniels' reputation. Hayes stated that Daniels was not a peaceful and quiet man, and that he was a shrewd individual.

Lieutenant James Lynch testified that, at 2:06 a.m., on January 12, 1978, he received a call from the dispatcher that a homicide had taken place at 27061 Sidney Drive, Apt. 59; that, as he pulled into the driveway, Detectives Nebe and Schaefer pulled in right in front of him; that, as he exited he observed a woman in the driveway area holding a gun; that Detective Nebe removed the gun from appellant's hand; that Detectives Nebe and Schaefer entered the apartment first; that Lynch then entered the apartment and asked appellant to remain in the kitchen with Patrolman Horton; that Lynch entered the living room area and observed a male seated in a chair, slumped over to the left side, with his left arm dangling down, and left arm and shoulder covered with blood and blood dripping from a head wound.

Lynch further testified that he then returned to the kitchen and advised appellant of her rights in the presence of Detective Nebe, Patrolman Coy, and Patrolman Horton; that appellant stated that she understood her rights; that he then asked her if she would like to tell

him what had happened and that she responded as follows: that Daniels had become upset with her because she had burned something in the oven; that he had slapped her around and pushed her onto the couch in the living room; that he then walked over to a chair and sat down; that she then picked up the gun on the couch, walked over next to the chair, and shot Daniels twice.

Lynch further stated that Daniels was sitting slightly forward in the chair, with his head and left arm on the left side of the chair, and his feet slightly forward of the chair; that, at the scene, appellant was very calm, showed little, if any, emotion, and appeared somewhat lackadaisical.

At the conclusion of Lynch's testimony, appellant moved for a mistrial on the ground that, as soon as the prosecutor knew that Patrolman Coy had made a significant mistake in his testimony, it should have been brought to the attention of both the court and defense counsel. The motion was overruled on the ground that the conflict in testimony involves a question of fact and credibility for the jury's determination.

Anthony Brooks testified that he had known Daniels since 1967; that Daniels was a heroin addict; that Daniels carried a gun with him everywhere; that he had seen Daniels assault appellant on a few occasions; that he had seen Daniels kill at least five people; that, when appellant left Daniels, he would often physically force her back to him; and that he had also seen Daniels strike his ex-girlfriend.

Dr. Alvito Carrasco testified that he treated appellant on January 12, 1978, at approximately 3:00 a.m., when Euclid police brought her to the hospital; that the area around appellant's right eye was swollen and discolored, which, according to appellant, was the result of a beating two or three days earlier; that he had appellant undress and saw no indication of injuries that had occurred during the past few hours; that appellant was extremely nervous and shaky; that he gave her five milligrams of

valium that evening; and that appellant told him that Daniels had carried a gun, and had been beating her for the past two to three years, and that, on that evening, she had been unable to control herself and after Daniels struck her, she fired the gun.

Detective Ted Schaefer, Euclid Police Department, testified that, at noon on January 12, 1978, he was informed that an attorney was at the police station to see appellant; that one-half hour later, after appellant and her attorney had conferred, the attorney told him that he did not want appellant to make any written statements; that he then spoke to appellant in her attorney's presence, at which time appellant stated the following: that, on the evening of the shooting, Daniels became upset about a pawn ticket he had found among appellant's belongings; that Daniels pushed her onto the couch and shouted at her; that he sat down in a chair, and then started to arise. At this point, appellant stated that she knew she was in for another beating, and picked up the gun and fired twice at Daniels.

Detective Howard Nebe testified that appellant told him that Daniels was sitting when she shot him, but that she thought he was about to rise; and that a slug was found in the padding seven inches from the bottom of the chair in which Daniels was found immediately above the wooden frame.

At the conclusion of Nebe's testimony, the state rested and appellant moved for a judgment of acquittal, which was overruled.

Appellant took the stand in her own behalf and provided the following testimony: Appellant stated that she and Daniels had lived together sporadically from July, 1975 until January, 1978; that he first beat her in late 1976, during an argument about her job; that, after the second beating, she left him, but returned when he promised to change; that, on one occasion after a beating, she left him and stayed at her sister's but Daniels kicked open her sister's door, threatened her family with

a gun, and told her family that he was taking her with him and that she belonged to him. Appellant further testified that Daniels had once choked her during an argument, and that, during the most recent beating on January 8, 1978, Daniels had smacked her face, struck her with his fists, knocked her down, and beat her with the butt of a gun because she had refused to obey his orders.

Defense counsel's questions regarding the events leading to the shooting, and appellant's responses thereto, follow:

"A. When we got home, Ernestine was going up the stairs, and I started up the stairs behind her, and '2' says, 'Shorty, I want to talk to you.'

"Q. Do you know what time this was, Kathy?

"A. No. But I would say it was close to midnight.

"Q. So what happened next?

"A. Him, and G-2, and Giho, which is William Sanders, were downstairs watching the 'Untouchables.' I asked him if I could put my nightgown on first. He said, 'Go ahead, but bring your purse back with you.'

"And I came back downstairs, and I was laying on the couch. William went upstairs to go to bed.

"Q. Do you know when that was, Kathy?

"A. I can't tell you the exact time. I don't really know.

"Q. Was it after the 'Untouchables' was over?

"A. Yes. They watched the 'Untouchables' together. At the end of that Reuben started to talk to me. He went upstairs.

"Q. What happened next?

"A. He said that—

"Q. Who is he?

"A. G-2.

"MR. LAZZARO: Objection to what he said.

"THE COURT: At this point, overruled.

"A. He went to the refrigerator, and he said, "This is the kind of shit I am talking about, bitch. I paid

$7.00 or something for a fish dinner from RC Food, and you can't eat it. Do you have problems?'

"I said, 'Yes. I just can't eat,' I said. 'But I will eat it now. I will eat it now.'

"I got up off the couch to go into the kitchen. And he said, 'No. Don't bother. I will do it. I will watch it for you. You just tell me what to do.'

"I said, 'All you have to do is just put the oven on warm, and put the fish in there.'

"It was already cooked. It was from a restaurant. He did. He put it in the oven. He came back into the living room, and he took his gun out, and he started tapping it on the table.

"And he said, 'Bitch, you are never going to learn, are you?'

"During this time he had gone through my purse. I said, 'I am never going to learn what?'

"He said, 'You are never going to learn that I do what the fuck I want to do, and you do as I tell you.'

"He then showed me the pawn ticket and $55 that he had gotten out of my purse. He put it into his shirt pocket, and he said that he was going to kill me. And he said, 'Don't even try crying. It is not going to help you.'

"He was still arguing at me, and he went and he smelled something. And he asked me did I smell something, and I said, 'Yes.'

"So I jumped off the couch to run into the kitchen, to see if it was in the oven, if it was the fish. And the oven was on 450, and I turned it off.

"He came into the kitchen. He was right behind me, going in the kitchen with me, to see if the oven was on fire or if the fish was burning.

"He turned me around, and held me at my collar, and said, 'Bitch, this is what I am talking about when a man does a woman's job. I am supposed to take orders from you now, right?'

"And I said, 'No. I was warming it. I told you to only put the oven on warm.'

"And he said, 'You make me so fucking sick.'

"He had me by my collar, and he smacked me with his open hands.

"Q. Where did he smack you, Kathy?

"A. In my face. He pushed me into the living room, and I stumbled, and he grabbed me from behind, and pulled me up so that I didn't fall on the floor. And he pushed me over onto the couch.

"He was saying, 'I am so fucking tired of you. You think you are so fucking smart.'

"And he didn't know if he should beat me or not, or just blow my fucking brains out. And he was pacing and walking, and I leaned over and picked the gun up off the couch.

"Q. Why did you do that, Kathy?

"A. I didn't want him to have it, and I knew what would happen if he did get it. But he turned around, facing me.

"Q. Where was he, Kathy, at that time?

"A. Pardon me?

"Q. When he turned around to face you, where was he in the room?

"A. He was standing by the chair.

"Q. Now, drawing your attention over here, is this the couch you are talking about that you were on?

"A. Yes.

"Q. Okay. Fine. Continue.

"A. He said, "You fucking bitch. You have got the nerve of pulling a fucking pistol at me?" And he started coming towards me.

"Q. And in what direction did he come, Kathy?

"A. He was coming right over by the coffee table, to the right.

"Q. Like this?

"A. Yes.

"MR. LAZZARO: Excuse me. I can't see.

"Q. Where were you, Kathy?

"A. I was still on the couch.

"Q. About here?

"A. Yes.

"Q. And he came at you around here?

"A. Yes. I jumped up.

"Q. And what did you do?

"A. I went over to the side.

"Q. And what did he do?

"A. He went back to where he was.

"Q. To back here?

"A. Yes.

"Q. And what were you planning to do at that time, Kathy?

"A. I was planning to bluff my way out.

"Q. Bluff you way out of where?

"A. Out of the house.

"Q. Why?

"A. Because I told him I wanted to leave, because I knew he was going to get ready to beat me or kill me, and I was scared.

"Q. And what happened next?

"A. He was still hollering and screaming, and I was saying, 'Just don't move. Stay where you are.'

"And I remember cocking the gun. And when I cocked the gun, then he made a quick move towards me. I fired it, and he fell back in the chair, and I fired it again.

"And I started screaming, 'Giho, Giho.'

"He heard the shots, I guess. Him and his wife were already on their way downstairs. And when they got down there, '2' was slumped in the chair.

"And Giho said, 'What happened?'

"And I said, 'What do you think happened, Giho? He was going to kill me.' "

Appellant further testified that Daniels had training in the martial arts; that she had observed him disarm a man during an argument; and that she had seen him beat women who were supposedly giving him money. Ap-

pellant also stated that, on January 12, 1978, she fired at Daniels because he had made a move towards her and she knew that he could take the gun and would kill her for picking up the gun in the first place.

Cynthia Hurns, appellant's mother, testified that she observed Daniels hit appellant in 1976; that, on at least three occasions, she had seen appellant with bruises on her face and body; and that she had seen Daniels pull a gun on appellant.

Lynn Ann Radcliffe testified that she had known appellant since May, 1975; that she knew Daniels through appellant; that their relationship was stormy; that she had seen Daniels hit appellant and had seen appellant with bruises on her body; that, in the fall of 1976, appellant called her to take her to the hospital, as she had been beaten in the face and her eyes were swollen and lips were bruised. Radcliffe further stated that she visited appellant early in 1976; that, at that time, appellant and Daniels argued and Daniels beat appellant in the face with his fists, and was almost berserk; and that Daniels always had guns around. Radcliffe also stated that she saw appellant again in 1977, when appellant called her and asked if she could stay with Radcliffe for a while; that appellant stayed with her for one week, during which time she was quite upset; and that appellant left Radcliffe's house after someone had informed Daniels as to where appellant was staying.

Lynn Turner testified that she was Daniels' girlfriend from 1971-1975; that he beat her practically every other night during that period; that she saw Daniels beat appellant at the Lancer Hotel; and that she had seen Daniels take a combination of valium and heroin and then become wild and argumentative.

At the conclusion of Turner's testimony, defense counsel stated that he intended to call to the stand two expert witnesses on battered women, in order to explain to the jury the concept of a battered woman. In its chambers, the court conducted a voir dire of these two witnesses

and concluded that their testimony would not be admissible on the ground that the subject of battered women does not require expert testimony to assist the jury in understanding the case, and that neither of the witnesses could testify as to appellant's state of mind at the time of the shooting, as neither had personally counselled appellant.

At this time, appellant renewed her motion for a judgment of acquittal, which was again overruled.

The court then stated that it would instruct the jury on voluntary manslaughter as well as murder. Appellant objected on the ground that voluntary manslaughter is not a lesser-included offense of murder, and that such an instruction would violate the holding of *State* v. *Nolton*, 19 OhioSt.2d 133, 48 O.O.2d 119 (1969), in that the court also intended to instruct the jury on self-defense. The court then decided not to instruct on voluntary manslaughter, based on the case of *State* v. *Nolton*, *supra*.

The following self-defense instruction, in pertinent part, was given:

"To constitute self-defense, ladies and gentlemen, there must have been on the part of Kathy Thomas a careful use of her faculties and reasonable grounds to honestly believe that she was in an immediate danger to her person or to her life.

"* * *

"In determining whether a Defendant such as Kathy Thomas had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant, Kathy Thomas, with her characteristics, with her feelings, with the disparity of size between Daniels and the Defendant, Kathy Thomas, with her knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded her at the time the act was done. You must consider also the conduct of Reuben Daniels and determine if his act or words or whatever you find in the evidence caused the

Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm * * *."

On June 20, 1978, the appellant was found guilty of murder as charged in the indictment, and was sentenced to from fifteen years to life imprisonment. On June 30, 1978, appellant filed a motion for a new trial which was overruled on July 14, 1978.

Appellant filed a timely notice of appeal from the judgment of conviction and presents seventeen assignments of error for our review. For the purpose of this published opinion, only the tenth assignment of error will be discussed. While the remaining assignments of error are not well taken and were discussed in the full journal entry and opinion, they will not be discussed in this published opinion.

"X. THE APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO ALLOW EXPERT WITNESSES TO TESTIFY FOR THE DEFENSE."

In appellant's tenth assignment of error, we are confronted with the novel issue of whether expert testimony is admissible in the defense of a woman who, charged with the murder of her common-law husband, asserts the defense of self-defense, claiming that, as a result of physical and emotional abuse by the deceased over a three-year period, the events leading up to the homicide caused her to reasonably believe that she was in imminent danger of death or great bodily harm.

The concept of self-defense as justification for homicide is well established in the law. Homicide is justifiable on the basis of self-defense if there was on the part of the defendant a careful use of his or her faculties and reasonable grounds to honestly believe that there was an immediate danger of death or great bodily harm. The standard to be applied in evaluating reasonableness has been defined in this state as the perception of apprehension and imminent danger from the defendant's own perspective. 4 OJI Criminal 411.33.

The standards for the use of expert testimony are also well established. Where a subject is so distinctly related to some science, profession, or occupation so as to be beyond the ken of the average layperson, the use of expert testimony is warranted in order to assist the trier of fact in its search for the truth. *McKay Machine Co.* v. *Rodman*, 11 OhioSt.2d 77, 40 O.O.2d 87 (1967); *Dyas* v. *United States*, 376 A.2d 827 (D.C. 1977), *cert. denied*, 434 U.S. 973 (1977). In order for the testimony to be admissible, the witness must have sufficient skill, knowledge, or experience in the field as to make it appear that his opinion or inference will probably aid the trier of fact in its search for the truth.

Whether expert testimony on the phenomenon of battered women is appropriate in a case such as the one before us is, as yet, an undecided question.

Although women have been victims of domestic violence throughout history, it has not been until very recently that sociologists and psychologists have undertaken to study the phenomenon of wife-beating, the societal context in which it occurs, and the complex interaction of historical, cultural, and psychological factors that play a role in the battered woman phenomenon. The traditional reluctance among abused women to report incidents of beatings has secreted the problem from public consciousness and scrutiny until just very recently. From the current psychological and sociological research has emerged a profile of the battered woman as one who displays unique behavioral patterns and psychological characteristics, as well as differences in reaction and perception.[1]

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[1] See "Battered Women," Info Digest, Wash. D.C.: Business and Professional Women's Foundation (1976); Bell, Joseph, "Rescuing the Battered Wife," Human Behavior (June, 1977); Eisenberg & Micklow, "The Assaulted Wife: Catch-22," 3 Women's Rights L. Rep. 138 (1978); Fah, Naomi, "'The Battered Woman' Bandwagon," Health Right, Vol. III (Summer, 1977); Faulk, M., "Men Who Assault Their Wives," Medicine, Science, & the Law (1974);

Up until the present time, almost all of the literature on the subject of battered women has been written in a sociological and/or psychological vein, and has not considered this phenomenon in the context of litigation and its acceptability as a topic for expert testimony. However, the literature clearly establishes that the subject of the battered woman, and especially her unique psychological characteristics and differences in reaction and perception, is not one within the knowledge and comprehension of the average person. The recent developments in this area contradict the commonly-held view of the battered woman, provide relevant information in an area which heretofore has been viewed through ignorance, and present a different perspective on a set of facts which might ordinarily be construed as representing a typical assault and battery case.

Field, Henry F. and Martha H., "Marital Violence and the Criminal Process: Neither Justice Nor Peace," Social Services Review, (April 20, 1977); Fields, Marjory, "Representing Battered Wives, or What to Do Until the Police Arrive," The Family Law Reporter (April 5, 1977); Gayford, John T., "The Plight of the Battered Wife," International Journal of Environmental Studies, Vol. 10 (1977); Gelles, Richard, The Violent Home, Sage Publications (1972); Gelles, Richard, "Abused Wives: Why Do They Stay?," unpublished manuscript presented at the Eastern Sociological Society, Boston, Mass. (March, 1976); Gibbens, T.N.C., "Violence in the Family," Medico-Legal Journal (1975); Guyford, T. T., "Wife Battering: A Preliminary Survey of 100 Cases," British Medical Journal (Jan. 1975); Jacobson, Beverly, "Battered Women," Civil Rights Digest (Summer, 1977); Langley & Levy, Wife Beating: The Silent Crisis, New York: E.P. Dutton (1977); Martin, Del., Battered Wives, San Francisco: Glide Publications (1976); O'Brien, John E., "Violence in Divorce-Prone Families," Violence in the Family; Pizzey, Erin, Scream Quietly or the Neighbors Will Hear, England: Penguin Books (1974); "Points and Authorities in Support of a Defendant's Use of Expert Testimony on the Subject of Reaction of Rape Victims to the Act of Rape, PEOPLE v. GARCIA," Frontier Issues in Criminal Litigation (August, 1977); Schneider, Elizabeth; Jordan, Susan, "Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault," 4 Women's Rights L. Rep. (Rutgers Law School, 1978); Strauss M., "Sexual Inequality, Wife-Beating," Victims & Society 543 (1976); Sullivan, Joan C., "Prime: Havens for Battered Wives," Trial, Vol. 12 (Jan. 1976); Task Force on Domestic Violence: The Report From the Attorney General's Task Force on Domestic Violence—Sponsored by Atty. Gen. William J. Brown; The Silent Victims; Denver's Battered Women, Wash. D.C.: U.S. Commission on Civil Rights (August 1977); Walker, L., "Who Are the Battered Women?," 11 Frontiers: J. Women Studies (Spring, 1977); Walker, "Battered Women and Learned Helplessness," 2 Victimology: An Internat'l J. 525 (1977).

Although the subject matter on which expert testimony has been held admissible has traditionally been strictly of a scientific or technical nature, the dynamic nature of the law invites change in order to keep pace with developments in areas unfamiliar to the layperson. Such a change is reflected in the Ohio Federal Rules of Evidence, which provide in essence that testimony by experts is appropriate where the untrained layperson could not determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. F.R. Evid. 702, Advisory Committee's Note.[2]

Our research reveals almost a total lack of authority in regard to the propriety of expert testimony on the subject of battered women where a battered woman charged with the murder of her spouse asserts self-defense as justification for the homicide. One case has been found in support of this proposition, *Ibn-Tamas* v. *United States*, 407 A.2d 626 (D.C. 1979), and none to the contrary have been cited to us or discovered through our independent research. Thus, we must evaluate for ourselves whether the average juror is in a position to judge from the evidence the battered woman's claim of self-defense, or whether this issue is too complex and foreign for the average person to resolve in the absence of expert testimony.

[2] It should be noted that the Ohio Rules of Evidence were adopted by the General Assembly on July 1, 1980. Rule 702 of the Ohio Rules of Evidence contains language identical to that of F. R. Evid. 702.

A consideration of the standards for the admissibility of expert testimony and the substance of the literature on battered women, leads us to conclude that this is a subject appropriate for expert testimony. Where a woman charged with the murder of her spouse presents evidence of an ongoing battering situation, and asserts self-defense as justification for the homicide, in the absence of expert testimony on the unique psychological state of the battered woman, a jury would be unable to properly consider the self-defense claim as it would not have a sufficient comprehension of the defendant's state of mind at the time of the homicide. Expert testimony in such a case is critical to an understanding of the defendant's state of mind at the time she committed the homicide, and as to the issue of the reasonableness of her act. It should be noted that such a holding in no way alters the law of self-defense by sanctioning the use of expert testimony. To the contrary, such expert testimony will assist the jury in gaining an insight into the defendant's state of mind for the purpose of evaluating her perception of imminent and lethal danger at the time she committed the homicide.

Returning now to the instant case, appellant claims that the trial court erred in excluding the testimony of Gerald Buckley, an expert witness on the subject of battered women, whose testimony was proffered by the defense.[3] She claimed that the testimony of such an expert was relevant in order to assist the jury in determining the credibility of her claim that, at the time of the shoot-

[3] The trial court conducted a voir dire examination as to the competency of Lynn Rosewater, also offered as an expert witness. However, no proffer was made of the testimony she would have presented. Inasmuch as appellant failed to make a proffer of Rosewater's intended testimony, she must be deemed to have waived the error by failing to demonstrate its prejudicial effect. POKORNY v. LOCAL 310, 35 Ohio App.2d 178, 64 O.O.2d 277 (1973), rev'd. on other grounds, 38 Ohio St.2d 177, 67 O.O.2d 195 (1974). Therefore, our discussion of this assignment of error will focus solely on the court's ruling with respect to Buckley.

ing, she perceived herself in such imminent danger from Daniels that she shot him in self-defense.

The trial court refused to permit Buckley to testify on two grounds. First, the court stated that Buckley was not qualified as an expert in this particular case as he had not personally interviewed appellant and therefore could not address the issue of her state of mind. Secondly, the court stated that the subject of battered women is not one requiring the use of expert testimony. Based on our earlier discussion of the propriety of expert testimony in a case such as the one before us, the only open question is whether Buckley was qualified to address the subject of battered women. In the judge's chambers, Buckley told the trial court that he had studied and evaluated for treatment approximately 300 women who had been repeatedly physically and emotionally abused by a spouse or boyfriend over a substantial period of time; that he had worked for the Center of Human Services as a psychiatric social worker for ten years, dealing with all sorts of psycho-emotional problems, about 20% of which involved battered women; that he had a master's degree in social work, with a concentration in psychiatric social work; that he had provided crisis counseling for the past eight years, repeatedly dealing with battered women; that he was a referral source for the Battered Women's Hotline; and had been counseling batterers over the past three years.

The trial court considered Buckley unqualified to testify as an expert witness in the instant case as he had not personally interviewed appellant and thus would have been unable to testify as to her state of mind. However, as a prerequisite to testifying, an expert need only be sufficiently qualified so that his opinion be based upon some superior knowledge not possessed by ordinary jurors. *State Auto Mutual Insurance Co.* v. *Chrysler Corp.*, 36 OhioSt.2d 151, 65 O.O.2d 374 (1973). It must appear from the expert's qualifications and special knowledge that he either has an opinion of his own, or is able

to form one upon the matter in question. Thus, it is not necessary that the expert have had personal dealings with the appellant. It is necessary, however, that, if presented with a hypothetical situation comprised of the facts in the instant case, he would be capable of forming an opinion on appellant's state of mind at the time of the shooting. Based on his credentials, we are persuaded that Buckley had sufficient knowledge and experience in the area of battered women to make it appear that his opinion would shed light on a relevant aspect of the relationship between appellant and Daniels which a layperson, without the assistance of expert testimony, would not perceive from the evidence itself.

In summary, at the present time, the law regarding the propriety of expert testimony on the psychological characteristics of a battered woman in a case such as the one before us, has yet to be established. While the literature in this area has been limited to a psychological and sociological analysis of the battered woman phenomenon as opposed to a consideration of this subject in a litigation context, the writings do clearly indicate that the subject is one beyond the comprehension of the average person. With the surge of murder cases involving the assertion of self-defense by a battered woman, it is necessary for us to evaluate whether this topic is appropriate for expert testimony. A review of the standards for expert testimony, coupled with a review of the literature on battered women, necessitates the finding that expert testimony is appropriate on the battered woman phenomenon in a case such as the one before us. Based on this conclusion, as well as our finding that Gerald Buckley was sufficiently qualified to present such expert testimony, appellant's tenth assignment of error is well taken. Inasmuch as the trial court erred in rejecting Buckley's testimony, this cause must be reversed and remanded for a new trial.

PARRINO, C. J., concurs.

KRUPANSKY, J., dissents.

KRUPANSKY, J., dissents. I respectfully dissent from the majority's reasoning and result in the tenth assignment of error. I do, however, concur with the majority in the remainder of the opinion.

In appellant's tenth assignment of error she argues the trial court erred in not admitting the testimony of expert witnesses on the subject of the "battered woman syndrome." I find no merit in this argument.

The record indicates an extensive voir dire of appellant's expert witness, Gerald Buckley. Upon questioning by defense counsel and the trial court, Buckley testified to his credentials as an expert in the field of battered women. (Tr. 1542-1546) Defense counsel then asked several questions in response to which Buckley stated his opinions as to the definition of a battered woman (Tr. 1547), a profile of a battered woman (Tr. 1547-1548), and the kind of relationship that exists between a man and woman in a battering situation. (Tr. 1548-1549)

Buckley also stated some of the criteria he uses to determine that a battering situation exists might not be present in appellant's case. (Tr. 1557-1558) He further stated that he never counselled with appellant at any time (Tr. 1561-1562), and that he did not know appellant's subjective intent or her reasons for reacting as she did. (Tr. 1558)

The trial court refused to allow Buckley to testify as an expert on battered women. The trial court clearly accepted Buckley's credentials and experience as establishing his expertise in the area, but found that expert testimony was not required in the instant case. (Tr. 1562-1563, 1565, 1566) The trial court found the facts did not establish the need for such testimony and further that his jury charge on self-defense would fairly and adequately delineate the scope of the jurors' deliberations on this issue. The court instructed the jury in pertinent part as follows:

"To constitute self-defense, ladies and gentlemen, there must have been on the part of Kathy Thomas a careful use of her faculties and reasonable grounds to honestly

believe that she was in an immediate danger to her person or to her life. There must have been a sufficient act by the deceased, Reuben Daniels, coupled with the apparent present ability to carry it out, to cause the Defendant, Kathy Thomas, to reasonably believe that the other party, that is Reuben Daniels, intended to kill her or do great bodily harm, and that the killing or shooting was necessary to save herself from death or great bodily harm.

"* * *

"In detremining whether a Defendant such as Kathy Thomas had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant, Kathy Thomas, with her characteristics, with her feelings, with the disparity of size between Daniels and the Defendant, Kathy Thomas, with her knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded her at the time the act was done. You must consider also the conduct of Reuben Daniels and determine if his act or words or whatever you find in the evidence caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm." (Tr. 1896-1898)

My first observation concerning appellant's tenth assignment of error is that despite the extensive voir dire no proffer was ever made of what Buckley's testimony would have been had he been allowed to testify. Therefore, appellant is deemed to have waived the alleged error.

Assuming, arguendo, we could consider the voir dire of Buckley as a proffer of his proposed testimony, appellant still failed to establish she was in any way prejudiced by its exclusion.

The entire purpose for offering Buckley's testimony would be to aid the jury in understanding the reasonableness of appellant's actions vis-a-vis appellant's attempt to establish she killed Daniels in self-defense. However, it is clear from Buckley's voir dire that he could not state an opinion as to appellant's state of mind from first-hand examination and counselling which is not fatal in itself if the hypothetical question is asked. Furthermore, Buckley was never asked a hypothetical question based on the facts presented in the instant case. *Thus, there was no proffer of his opinion as to whether appellant was a battered woman and whether the theories he testified to were applicable to her situation and the instant case.* Having failed to ask such a hypothetical question and to receive an answer supporting her claims of being a battered woman, appellant has failed to establish she was prejudiced by the exclusion of Buckley's testimony.

As to appellant's other proposed experts on battered women, the record is void of anything remotely resembling a proffer of testimony and therefore any alleged error is deemed waived.

At the trial level defense counsel tried to use appellant's case to establish a public forum for promoting the cause of the battered woman. They are continuing to pursue this cause on appeal. However, this court must not be blinded by the rhetoric no matter how righteous the cause may be. Nor may we use an inappropriate case as a springboard to break new ground in undeveloped areas of the law in order to be part of the avant garde.[1] We must decide the issue before us based on the law as we perceive it.

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[1] Appellant cites IBN-TAMAS v. UNITED STATES, 407 A.2d 626 (1979). In that case the District of Columbia Court of Appeals reversed and remanded a cause to the trial court for further consideration of its prior ruling on the admissibility of expert opinion testimony about the battered wife syndrome. We note, however, that defense counsel in that case proffered an unequivocal expert opinion, based on personal counseling with the defendant, that the defendant was a "classic case" of the battered wife and did in fact perceive herself to be in imminent danger at the time of the shooting. This kind of evidence is definitely lacking in the case sub judice.

The only issue before this court is whether the trial court erred in excluding the testimony of appellant's expert witness Gerald Buckley. Since the admission of expert opinion testimony lies within the sound discretion of the trial court, error can be predicated only on a finding of abuse of that discretion. Keeping this standard in mind, as well as the facts that appellant failed to demonstrate any prejudicial effect of the trial court's ruling, and the trial court's charge to the jury on self-defense was a fair statement of her rights under the law and facts of the instant case, we cannot state the trial court abused its discretion in refusing to admit Buckley's testimony.

In summation, I find appellant's tenth assignment of error to be without merit for the following reasons:

1. There was no proper proffer of expert testimony.
2. Appellant's expert had no personal contact with appellant.
3. No hypothetical question was propounded to appellant's expert witness.
4. There was no determination that appellant was, in fact, a battered woman.
5. Analysis of the issues raised was within the realm of the jury.
6. The trial court's jury charge more than adequately covered the situation.
7. There was no prejudice to appellant.
8. The trial court did not abuse its discretion.

Accordingly, appellant's tenth assignment of error should be overruled.

OHIO SUPREME COURT

[66 Ohio St. 2d 518]

OPINION, PER C. BROWN, J.

[June 24, 1981]

CLIFFORD F. BROWN, J. The sole issue raised by the state in its appeal to this court is whether the trial court committed reversible error by excluding testimony on the subject of the "battered wife syndrome" by an expert on battered wives, where defendant pleaded self-defense to killing her husband. We hold the common pleas court did not commit error in excluding such expert testimony. Therefore, we reverse the Court of Appeals, and affirm the conviction and sentence of defendant.

There are at least eight separate reasons to exclude this proffered expert testimony. See footnote 1, *supra*. Our conclusion would remain the same even if defendant's expert had personally interviewed defendant before being offered as a witness, even if defendant had conclusively established that defendant was, in fact, a battered wife, and even if defense counsel had propounded a hypothetical question to defendant's expert witness.

In a trial such as this one, where the evidence raises an issue of self-defense, the only admissible evidence pertaining to that defense is evidence which establishes that defendant had a bona-fide belief she was in imminent danger of death or great bodily harm, and that the only means of escape from such danger was through the use of deadly force.[2] *State* v. *Robbins* (1979), 58 Ohio St. 2d 74.

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[2] The trial judge fully and correctly instructed the jury on self-defense as follows:

"To constitute self-defense, ladies and gentlemen, there must have been on the part of Kathy Thomas a careful use of her faculties and reasonable grounds to honestly believe that she was in an immediate danger to her person or to her life. There must have been a sufficient act by the deceased, Reuben Daniels, coupled with

The jury is well able to understand and determine whether self-defense has been proven in a murder case without expert testimony such as that offered here. The jury will base its decision upon the material and relevant evidence concerning the participants' words and actions before, at, and following the murder, including defendant's explanation of the surrounding circumstances.

Also, such expert testimony is inadmissible because it is not distinctly related to some science, profession or occupation so as to be beyond the ken of the average lay person. Furthermore, no general acceptance of the expert's particular methodology has been established.[3]

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the apparent present ability to carry it out, to cause the Defendant, Kathy Thomas, to reasonably believe that the other party, that is Reuben Daniels, intended to kill her or do great bodily harm, and that the killing or shooting was necessary to save herself from death or great bodily harm.

"* * *

"In determining whether a Defendant such as Kathy Thomas had reasonable grounds for an honest belief that she was in imminent danger, you must put yourself in the position of the Defendant, Kathy Thomas, with her characteristics, with her feelings, with the disparity of size between Daniels and the defendant, Kathy Thomas, with her knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded her at the time the act was done. You must consider also the conduct of Reuben Daniels and determine if his act or words or whatever you find in the evidence caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm."

This full and fair instruction on self-defense prevented any error that could have occurred by the trial court's exclusion of expert testimony on the "battered wife syndrome."

[3] In support of her proffer of expert testimony about the "battered wife syndrome," defendant cites *Ibn-Tomas* v. *United States* (App. D.C. 1979), 407 A.2d 626. There, the District of Columbia Court of Appeals reversed and remanded that case back to the trial court for further consideration of its prior ruling on the admissibility of expert opinion testimony about the "battered wife syndrome." However, in that case, defense counsel proffered an

McKay Machine Co. v. *Rodman* (1967), 11 Ohio St. 2d 77; *Dyas* v. *United States* (App. D.C. 1977), 376 A. 2d 827, certiorari denied 434 U.S. 973; *Frye* v. *United States* (1923), 54 App. D.C. 46, 293 F. 1013. Finally, we believe the expert testimony offered here would tend to stereotype defendant, causing the jury to become prejudiced. It could decide the facts based on typical, and not the actual, facts.

Expert testimony on the "battered wife syndrome" by a psychiatric social worker to support defendant's claim of self-defense is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

There is one claimed error defendant raises as cross-appellant herein which deserves comment. She asserts denial of a fair trial because the trial court failed to instruct the jury concerning the lesser-included offense of voluntary manslaughter.

At the close of the evidence the trial judge informed counsel for both parties that he intended to instruct the jury on murder, voluntary manslaughter and self-defense. The defendant, however, objected to any instruction on voluntary manslaughter. That objection of defense counsel constitutes a waiver of the instruction and precludes consideration on appeal. Crim. R. 30; *State* v. *Williams*

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unequivocal expert opinion, based on personal counseling with the defendant, a showing that the defendant was a "classic case" of the battered wife and did in fact perceive herself to be in imminent danger at the time of the shooting. We lack this kind of evidence in the case *sub judice*. Moreover, even if the facts in *Ibn-Tomas*, *supra*, were factually to the case at bar, we reject its rationale and decline to follow it.

(1977), 51 Ohio St. 2d 112. Defendant now argues that the proposed instruction was improper based on a reading of *State* v. *Toth* (1977), 52 Ohio St. 2d 206. However, in a case decided nearly a full year before the challenged jury instruction, the Eighth District Court of Appeals in *State* v. *Muscatello* (1977), 57 Ohio App. 231. affirmed 55 Ohio St. 2d 201, held an instruction on voluntary manslaughter to be proper in an aggravated murder prosecution in which defendant elicited some evidence of the mitigating circumstance of extreme emotional stress. Given this prior decision, it is apparent that defense counsel in the instant case could have requested and framed an appropriate jury instruction on voluntary manslaughter if he had wanted it.

All the remaining propositions of law on other claimed errors advanced by defendant-cross-appellant are without merit.

For the foregoing reasons the judgment of the Court of Appeals is reversed.

Judgment reversed.

W. BROWN and SWEENEY, JJ., concur.

HOLMES, J., concurs in the syllabus and judgment.

CELEBREZZE, C. J., P. BROWN and LOCHER, JJ., concur in the judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C81-1517-A

Judge Leroy J. Contie

KATHY THOMAS, PETITIONER

vs.

DOROTHY ARN, SUPT., RESPONDENT

REPORT AND RECOMMENDATION OF MAGISTRATE

Magistrate Charles R. Laurie

Petitioner, Kathy Thomas, initiated this action for habeas corpus relief pursuant to 28 U.S.C. § 2254 and filed her application and brief on July 28, 1981. Respondent Arn filed a Return of Writ on December 28, 1981. United States District Judge Leroy J. Contie, Jr., referred the case to this Magistrate for a report containing proposed findings of fact, conclusions of law and a recommended disposition of the case.

HISTORY OF PROCEEDINGS

The Petitioner was indicted for murder under Ohio Revised Code Section 2903.02 by the January, 1978, Term of the Cuyahoga County Grand Jury. She entered a plea of not guilty and had a trial by jury in the Common Pleas Court for Cuyahoga County. As a result of her conviction in that case, Petitioner is serving a sentence of fifteen (15) years to life for the offense of murder. *State v. Thomas*, Case Nos. CR-37171 and CR-52801 (Cuyahoga County Court of Common Pleas, 1978).

Petitioner perfected a timely appeal to the Court of assignments of error:

1. The Appellant was denied her constitutional right to counsel, to a fair trial and to equal protection of the law by the trial court's refusal to allow an investigation and social scientist to sit at the trial table.

2. The Appellant was denied her constitutional right to a public trial by the court holding two parts of the trial in his Chambers.

3. The Trial Court committed prejudicial error by overruling the Appellant's motions to dismiss the indictment because of infirmities in the Grand Jury which indicted her.

4. The Appellant was deprived of a fair trial by errors committed during voir dire.

5. The Trial Court committed prejudicial error by not suppressing her oral statements to the police.

6. The Trial Court committed prejudicial error by not granting the Appellant's motion for mistrial on the grounds that the State had failed to inform defense about a significant change in the testimony of one of its witnesses.

7. The Appellant was deprived of a fair trial by the introduction and attempted introduction into her trial of irrelevant and immaterial questions, testimony and exhibits and by prosecutorial misconduct.

8. The Appellant was denied a fair trial by testimony of a State's witness that she had exercised her right to remain silent.

9. The Appellant was deprived of a fair trial by the introduction and admission of several photographs whose prejudicial effect outweighed any probative value of such evidence.

10. The Appellant was deprived of a fair trial by the Trial Court's refusal to allow expert witnesses to testify for the defense.

11. The Trial Court deprived the Appellant of a fair trial and of due process of law by not limiting the State to one closing argument.

12. The Appellant was denied a fair trial by prosecutorial misconduct during the closing. "Expert testimony on the 'battered wife syndrome' proffered to support a defendant's claims of self-defense to killing her husband is inadmissable in evidence where (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the 'battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value."

Petitioner is now before the United States District Court for the Northern District of Ohio, Eastern Division, seeking relief in federal habeas corpus. As grounds for relief, Petitioner sets forth the following allegations:

1. The Petitioner was denied a fair trial and her right to compulsary process by the refusal of the trial court to allow a defense witness to testify in her behalf.

2. The Petitioner was denied due process and a fair trial by the failure of the trial court to instruct the jury on the lesser included offense of voluntary manslaughter.

3. The Petitioner was denied a fair trial by the refusal of the Trial Court to allow counsel to voir dire the potential jurors concerning their attitude about battered woman and self-defense.

4. The Petitioner was deprived of due process of law by the Prosecutor's suppression of evidence favorable to her.

STATEMENT OF FACTS

On January 12, 1978, the Petitioner, Kathy Thomas, shot and killed her common law husband, Reuben Daniels. At trial the Petitioner testified that on the evening of the shooting, the Petitioner returned to her home which she shared with the deceased and another couple and was on her way upstairs when the deceased, who was watching television, indicated that he wanted to speak with her (TR. 1371). Petitioner went upstairs, changed her clothes and upon the request of the decedant returned with her purse (TR. 1371-1372). At that time the decedent became angry over the fact that the Petitioner had not eaten some fish and proceeded to heat it up for her (TR. 1372-1373). He then became angry over a pawn ticket he found in the Petitioner's purse and indicated that he was going to kill her (TR. 1373). Both the Petitioner and the decedent noticed that the fish was burning, at which point the decedent began to smack the Petitioner with his open hands (TR. 1373-1374). He then pushed her onto the couch and as he was pacing and threatening her, the Petitioner testified that she leaned over and picked his gun up off the couch (TR. 1373-1374). Petitioner testified that she did not want the decedent to get the gun because she feared that he would use it on her (TR. 1374). When the decedent turned around and saw her, he started coming toward her so she jumped up and pointed the gun at Daniels to try to bluff her way out of the house. (TR. 1375-1376). The decedent began hollering so the Petitioner cocked

the gun; he made a quick move toward her and then the Petitioner fired (TR. 1376-1377). Petitioner immediately went to a neighbor's and called the police (TR. 1377).

Several Police officers testified as to accounts given by the Petitioner as to what had occurred on the evening in question. Patrolman Timothy Coy testified that on the night of the shooting, he heard the Petitioner state that she and the decedent had had an argument and that he had become very upset with her, shoved her, struck her and pushed her from the kitchen to the living room and onto the couch (TR. 989-990). The decedent sat across from her in a chair (TR. 990). Patrolman Coy also testified that:

> "She stated that after he sat down on the chair, she picked up the revolver that was sitting on the couch, walked from around the coffee table, and walked over next to the chair and pointed it at Mr. Daniels and fired twice." (TR. 990).

Later, the Patrolman had questioned the Petitioner and she related a prior incident to him during which the decedent had severely beaten her with a pistol (TR. 992). Patrolman Coy also testified that the Petitioner and Daniels had argued on the evening of the shouting about burnt fish. (TR. 993-994). The officer stated that in relating the subsequent events, the Petitioner had indicated that Daniels had slapped her and pushed her onto the couch (TR. 994). At that time:

> ". . . he got up and turned and walked away from her, and was about to sit down in the chair when she picked up a gun that was sitting on the couch, and came around the coffee table, pointed at him and stated something like 'That is it,' or 'I have had enough.' . . . and as he turned, she shot at him twice, and he fell back into the chair." (TR. 994).

Lieutenant James Lynch also testified as to statements made by the Petitioner on the evening of the shooting saying:

> ". . . she said that Mr. Daniels had become upset with her because she had burned something in the oven, and that he had slapped her around and pushed her down on the couch in the living room, and then he walked over and sat down in the chair.
>
> She then picked up a gun that was already on the couch, walked over next to the chair, and shot him twice." (TR. 1109-1110).

Finally, Howard Nebe of the Euclid Police Department testified as to the account he received from the Petitioner of the events which occurred on the night of the shooting. He stated:

> "She had stated that Reuben and her had been arguing about fish, and that fish were burning, and that he had slapped her around from the kitchen all the way to the living room, knocking her to the couch, pushing her onto the couch, and he then went over and sat down. And she found a gun that was on the couch, she said, and picked it up and walked around the coffee table or cocktail table, and shot at him twice." (TR. 1287-1288).

The Petitioner and several other witnesses at trial testified that Petitioner's deceased common law husband had physically abused and beat the Petitioner on several previous occasions. Craig Hayes, a neighbor of the Petitioner (TR. 1098); Anthony Brooks, a friend of the decedent (TR. 1155-1158, 1162); Jessie Vaughn, the decedent's sister (TR. 1265); Dr. Alvito Carrasco, the physician at the emergency room at Euclid General Hospital (TR. 1188, 1193, 1197); Cythia Hurns, the Petitioner's mother (TR. 1473-1476); and Lynn Radcliffe, a friend of the Petitioner (TR. 1497-1499, 1509-1511) all testified either to having seen the decedent physically

abuse the Petitioner or to seeing the Petitioner with bruises or abrasions on her body. The Petitioner herself testified about the many times Reuben Daniels beat and otherwise physically abused her (TR. 1333-1334, 1341, 1356, 1360-1361, 1368). At trial, the Court ruled that no expert witness would be called with respect to the battered woman syndrome (TR. 1563).

Upon trial to a jury the Petitioner was found guilty of murder.

I

For her first ground for relief, the Petitioner asserts that she was denied a fair trial and compulsory process by the refusal to the Trial Court to allow an expert witness testify on the subject of the "battered woman syndrome." The Trial Court excluded the testimony of the expert following a *voir dire* of his testimony.

State court rulings regarding the admissibility of evidence are not cognizable in federal habeas corpus unless the fundamental fairness of the trial has been impugned. *Gemmel v. Buckhoe*, 358 F.2d 338 (6th Cir. 1966); *Bell v. Arn*, 536 F.2d 123 (6th Cir. 1976); *Reese v. Cardwell*, 410 F.2d 1125 (6th Cir. 1969); *Spencer v. Texas*, 385 U.S. 554 (1967). Upon review of the record of the instant case, it is clear that the fundamental fairness of the Petitioner's trial was not effected by the exclusion of the expert witness.

First, both at trial and on appeal, full and careful consideration was given to the question of whether expert testimony would be admitted on the "battered woman syndrome." At trial, the Court conducted a voir dire examination of the Petitioner's proposed experts before making a decision as to its admissibility (TR. 1541-1563, 1569-1575). The Trial Court indicated in response to the voir dire, that he felt that the battered wife syndrome was within the jury's understanding and that expert testimony would be irrelevant to the issue of self defense (TR. 1562-1563). The second expert was disqualified as being an interested witness (TR. 1575).

Additionally, on review the Ohio Supreme Court gave the issue of admissibility of expert testimony on the "battered woman syndrome" full consideration. The Supreme Court, in making its determination of admissibility used the same standard used in other "battered women" cases to determine the propriety of expert testimony. *Ibn-Tamas v. United States*, 407 A.2d 626, 26 Cr. L. 2149 (D.C. 1979); *Buhrle v. State*, 29 Cr. L. 2238 (Wyo., 1981). That standard set out in *Dyas v. United States*, 376 A.2d 827 (D.C. 1977), *cert. denied* 434 U.S. 973, involves consideration of the following criteria:

(1) Is the subject matter beyond the ken of the average laymen?

(2) Will the expert testimony aid the trier in his search for the truth?

(3) Has the pertinent art or scientific knowledge on which it is based reached such a state as to permit a reasonable opinion to be asserted even by an expert?

The Supreme Court of Ohio, in considering the propriety of the Trial Court's exclusion of the expert testimony answered each of these in the negative and concluded that the expert testimony should not be admitted. *State v. Thomas*, supra, syllabus. This decision was based on several factors set out in the Court's opinion. First, the Court stated that self-defense is a question that the "jury is well able to understand and determine" *State v. Thomas*, supra, at 521. The Court also determined that an expert's particular methodology for determining the existence of the battered wife syndrome has not been established "such as to require expert testimony". *State v. Thomas*, supra, at 521. Finally, the Court feared that expert testimony "would tend to stereotype the defendant" causing it to become more prejudicial than probative and, in fact, cause the jury to decide the case "on typical, and not the actual facts." *State v. Thomas*,

supra at 521. Thus, it is the finding of this Magistrate that the Courts below gave due consideration to the issue of whether expert testimony was proper and therefore did not violate Petitioner's rights to a fair trial in this respect.

Additionally, it is clear from the record that despite the exclusion of that testimony, the issue of whether or not the Defendant was a victim of the "battered woman syndrome" was allowed the Defendant to testify at length as to the occasions upon which the deceased struck her (TR. 1333-1335, 1347, 1356, 1360-1361, 1368, 1374). This included the relating of an incident in which the Defendant was severely beaten with the butt of a pistol (TR. 1361) and the relation of the events leading to the shooting of Daniels (TR. 1374). In addition, several friends and relatives of the Petitioner were permitted to testify either that they saw the Petitioner being battered by the decedent (TR. 1155-1159, 1162, 1473, 1497-1499, 1509, 1522), or that they had seen bruises on the Petitioners body (TR. 1094-1095, 1188, 1197, 1265, 1474, 1497, 1511). Testimony was admitted about one incident during which the Petitioner was taken to the hospital by her mother and Lynn Radcliffe for treatment of facial injuries (TR. 1475-1476, 1497). One of the decedent's old girlfriends, Lynn Turner, was also permitted to testify about the occasions when she was beaten by the decedent in order to help establish his violent character (TR. 1513-1535). Based on the receipt of this testimony, the jury had more than adequate evidence to draw the conclusion that the Petitioner was suffering from the "battered woman syndrome" and acting in self-defense had they chosen to do so. It is the finding of this Magistrate that the "battered woman syndrome" was sufficiently before the jury so as not to deny the Petitioner a fair trial. Therefore, it is the conclusion of this Court that Petitioner's first ground for relief is without merit.

II

Petitioner's second ground for relief alleges that she was denied due process and a fair trial by the failure of the trial court to instruct the jury on the lesser included offense of voluntary manslaughter. Trial counsel, however, failed to object to the failure of the trial court to instruct on that charge. To the contrary, trial counsel objected to the instruction on voluntary manslaughter when the trial court indicated the intent to instruct on it which in and of itself is sufficient grounds to preclude review. As the Petitioner stated in her brief, therefore, "the only issue this Court must decide is whether the failure of defense counsel to object to the fact that the trial court did not give a voluntary manslaughter instruction prevents this Court from reaching the merits of this issue." It is the opinion of this Magistrate that the failure to object does act as such a bar.

In a recent case, the United States Supreme Court held that for purposes of habeas corpus under 28 U.S.C. § 2254, after a state procedural default, the Petitioner must show both "cause" for the default and actual prejudice". *Isaac v. Engle*, —— U.S. ——, 31 Cr. L. Rptr 3001 (April 5, 1982). In that case it was determined that a change in interpretation of State law subsequent to trial does not provide "cause" for such a procedural default. 31 Cr. L. Rptr. 3007. The Petitioner here claims that she should not be required to object in light of the fact that *State v. Muscatello*, 55 Ohio St. 2d 201 (1978) was decided by the Ohio Supreme Court subsequent to her trial and that prior Ohio law under *State v. Toth*, 52 Ohio St. 2d 206 (1977), would not favor her objection. It was noted by the United States Supreme Court that:

> "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the State courts simply because he thinks they will be unsympathetic to the claim. Even a State court that has previously rejected a constitution argument may decide upon reflection, that the contention is valid." *Isaac v. Engle*, 31 Cr. L. Rptr. at 3007.

This reasoning is clearly applicable to the instant case as well. Petitioner certainly should have been aware that an argument of constitutional proportions existed in favor of requiring a trial court to instruct on such a lesser included offense. This is true because of the previous decision of the Court of Appeals for Cuyahoga County in *State v. Muscatello*, 57 Ohio App. 2d 231 which was later affirmed by the State Supreme Court. *State v. Muscatello*, 55 Ohio St. 2d 201 (1978). Thus, in light of the notice to counsel of the existence of an argument in favor of the Court instructions on voluntary manslaughter and the fact that counsel failed to object when that instruction was not given coupled with objection of trial counsel to its use, it is the determination of this Magistrate that no "cause" exists for the procedural default in the instant case and Petitioner's second ground for relief is therefore without merit.

III

Petitioner's third ground for relief alleges that she was denied a fair trial because of the trial court's refusal to allow voir dire of potential jurors concerning their attitudes about battered woman and self defense. The scope and procedure to be followed in the voir dire examination of prospective jurors is a question of state procedural law. See: Ohio Criminal Rule 24(A); *Krupp v. Poor*, 24 Ohio St. 2d 123 (1970); *State v. Ellis*, 98 Ohio St. 21 (1918). On review upon habeas corpus, the federal court is bound by a state court's interpretation of its own procedural rules. *Brewer v. Overberg*, 624 F.2d 51 (6th Cir. 1980) cert. denied. 449 U.S. 1085 (1981).

The Court of Appeals for the Eighth District of Ohio, in its decision below, reviewed the propriety of the voir dire proceedings in the instant case and determined that a "liberal voir dire was conducted" and that "the panel met the requirements of an impartial jury." *State v. Thomas*, Unreported, C.A. #39698 and 40028 (Cuyahoga Cty. July 24, 1980), at 35. Thus the state has determined that the state procedural requirements for voir dire were met in the instant case. Therefore, this Magistrate is bound by the State Court's ruling unless the alleged error constituted "a fundamental defect which inherently results in a complete miscarriage of justice," or in "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 471 (1962); *Davis v. United States*, 417 U.S. 333, 346, 94 S. Ct. 2298 (1974). Since the alleged procedural error does not violate the Petitioner's fundamental constitutional rights, it does not fall within the scope of 28 U.S.C. § 2254. *Stone v. Powell*, 428 U.S. 465, 477, 96 S. Ct. 3037 (1976).

This Magistrate further believes that the facts do not reveal that a miscarriage of justice has resulted from the limitation of the scope of voir dire by the Trial Court. To the contrary, it appears that the Trial Court made every effort to insure a unbiased and impartial jury. It is the finding of this Magistrate that Petitioner's third ground for relief is without merit.

IV

Petitioner's final ground for relief alleges that she was denied due process of law by the prosecutor's suppression of evidence favorable to her and the subsequent refusal of the Trial Court to grant a new trial on those grounds. Under Ohio law, the question of whether a new trial should be granted is governed by Criminal Rule 33(A) which provides in part:

> "(A) *Grounds.* A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights."
>
> . . .
>
> "(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial. . . ."

Since the granting or denying of a motion for a new trial is a matter of state procedure, this Court is bound by the State court's interpretation of its own rules. *Brewer v. Overberg*, supra. Thus, unless there was a violation of a fundamental right resulting in a miscarriage of justice or exceptional circumstances from which the need for habeas corpus is apparent, the holding of the Court of Appeals that the Trial Court did not abuse its discretion in refusing to grant the motion for new trial will not be disturbed. *Hill v. United States*, supra; *Davis v. United States*, supra. It is the holding of this Magistrate that such a miscarriage of justice did not occur.

Petitioner alleges that a new trial should have been granted since the Prosecutor failed to reveal, during the course of discovery, the existence of written statements of two witnesses. (Transcript of Hearing on Motion, hereinafter, T.O.H. at 3-4). It is claimed that these statements contained information favorable to the Petitioner (T.O.H. 4). The record reveals that defense counsel was aware of these witnesses and in fact interviewed them prior to trial (TR. T.O.H. 27). There was also conflicting testimony as to whether defense counsel was told of the existence of the statements prior to trial requiring a credibility determination by the trial court. (T.O.H. 21, 31, 42-43). From these facts it is clear that the decision of the trial judge to deny the motion of Petitioner for a new trial did not result in a miscarriage of justice. This Magistrate, therefore, finds that Petitioner's final ground for relief is without merit.

CONCLUSION AND RECOMMENDATION

The Writ of Habeas Corpus, as provided by 28 U.S.C. § 2254 offers relief to state prisoners who are in custody in violation of rights under the Constitution, laws, or treaties of the United States.

> In contrast to direct appellate review of cases originally tried in a federal court, where non-constitutional error can be and is often corrected, habeas corpus relief can only be afforded where the error claimed to have been committed in the state court system is one of federal constitutional dimensions. *Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975).

Following an exhaustive review of the pleadings, transcripts, briefs and applicable state and federal law, this Magistrate reaches the following conclusions:

1. Petitioner has failed to meet his burden of demonstrating a violation of any rights under the Constitution, laws, or treaties of the United States as required by 28 U.S.C. § 2254. *Allen v. Perini*, 424 F.2d 134 (6th Cir. 1970).

2. An evidentiary hearing is not required under the criteria of 28 U.S.C. § 2254 (d). See: *Townsend v. Sain*, 372 U.S. 293 (1963).

This Magistrate, therefore, respectfully recommends to the District Court that the Petitioner's application for habeas corpus be denied and dismissed.

/s/ Charles R. Laurie
CHARLES R. LAURIE
United States Magistrate

[May 11, 1982]

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title Omitted]

ORDER

Before the Court is petitioner Kathy Thomas' action for habeas corpus relief pursuant to 28 U.S.C. § 2254. The petitioner lists four grounds for relief: 1) the refusal of the trial court to allow the testimony of an expert witness concerning the "battered wife syndrome" was a denial of a fair trial and the right to compulsory process; 2) the failure of the trial court to instruct on the lesser included offense of voluntary manslaughter was a denial of due process; 3) the refusal by the trial court to allow counsel to voir dire potential jurors concerning their attitudes about battered wives was a denial of a fair trial; and 4) the prosecutor's suppression of exculpatory evidence was a denial of due process.

By Order this Court referred this matter to a United States Magistrate for his report and recommendation on July 29, 1981. The Magistrate filed his report and recommended disposition on May 11, 1982. The Magistrate recommends that Kathy Thomas' petition be denied with regard to all four listed grounds for relief. The petitioner filed a motion for extension of time to file objections to the Magistrate's report and recommendation. This motion was granted and the petitioner was given until June 15, 1982. The petitioner, however, has failed to file objections.

The petitioner shot her common law husband, Rueben Daniels, in the head and the arm and killed him. She was convicted of murder by a jury and was sentenced to

15 years to life imprisonment. The petitioner claimed at trial that she shot Mr. Daniels in self-defense.

In support of this claim of self-defense, the petitioner presented evidence that she had been beaten and abused by her common-law husband in the past and that she shot her husband during the course of or after a heated fight.

In support of this claim, the petitioner attempted to present the testimony of expert witnesses concerning the "battered wife syndrome." The trial court conducted a voir dire examination of the petitioner's proposed experts and found that the "battered wife syndrome" was within the jury's understanding and that such testimony was irrelevant to the issue of self-defense.

The petitioner appealed her conviction asserting 17 assignments of error and the Ohio Court of Appeals reversed and ordered a new trial on the basis that the trial court erred in not allowing petitioner's experts to testify concerning the "battered wife syndrome." The prosecutor appealed to the Supreme Court and after full consideration, Ohio's highest court held that:

> Expert testimony on the "battered wife syndrome" proffered to support a defendant's claims of self-defense to killing her husband is inadmissible evidence where 1) it is irrelevant and immaterial to the issue of whether [the] defendant acted in self-defense at the time of the shooting; 2) the subject of the expert testimony is within the understanding of the jury; 3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and 4) its prejudicial impact outweighs its probative value.

State v. Thomas, 66 Ohio St. 2d 518 (1981).

I. *The "battered wife syndrome"*

Petitioner contends that the trial court and the Ohio Supreme Court's reasoning concerning the admissibility of the expert testimony regarding the "battered wife syndrome" is faulty. The petitioner also contends that the question before this Court is simply whether or not this evidence is admissible. Further, the petitioner argues that this evidence was admissible because: (a) the "battered wife syndrome" is beyond the common knowledge of jurors; (b) the subject has been sufficiently studied to qualify as a subject requiring expert testimony; (c) the testimony was critical to petitioner's defense (in terms of explaining how petitioner could be able to predict an explosion of aggression and in explanation of why the petitioner might remain living with the deceased after receiving beatings); and (d) to dispel any myths associated with the "battered wife syndrome."

As a matter of evidentiary law in Ohio, the Ohio Supreme Court has stated in this case that expert testimony concerning the "battered wife syndrome" is not admissible evidence. This state court evidentiary ruling may not be questioned in a federal habeas corpus proceeding unless it raises a federal constitutional question. *Bell v. Arn*, 536 F.2d 128 (6th Cir. 1976). "Where there is no question concerning a federally significant external event such as the voluntariness of a confession or the knowing use of perjured testimony, trial court rulings on the admissibility of evidence may not be questioned in a federal habeas corpus proceeding." *Chavez v. Dickson*, 280 F.2d 727, 736, cert. denied, 364 U.S. 934 (cited with approval in *Bell v. Arn*, *supra*). The Court finds, therefore, that it is not sufficient that the evidence be admissible to be a cognizable claim in a habeas corpus petition. To be violative of due process, the failure to receive evidence must impinge on the fundamental fairness of the entire trial.

In the present case, the Court cannot find that the failure to receive expert testimony concerning the "battered wife syndrome" impugned the fairness of the petitioner's trial. Evidence concerning the petitioner's abuse by the decedent was received in detail via the testimony of the petitioner and other witnesses. The effect that these beatings had on the petitioner in her claim of self-defense, therefore, was clearly submitted to the jury for their consideration. Second, the voir dire of the experts' testimony did not establish a nexus between such testimony and the particular facts of petitioner's situation. *See State v. Thomas*, 66 Ohio St. 2d 518, 519, n.1 (1981). Third, the voir dire examination did not establish, via a hypothetical question or otherwise, a nexus between such testimony and petitioner's claim of self-defense. The Court finds, therefore, that the petitioner has failed to assert or establish a constitutional error concerning the Ohio Supreme Court's evidentiary ruling under Ohio law. The Court agrees with the Magistrate's report, therefore, that petitioner's first ground for relief is without merit.

II. *Jury Instruction on the Lesser Included Offense of Voluntary Manslaughter.*

The trial court informed counsel that it would give jury instructions concerning the elements of murder, voluntary manslaughter and self-defense. Defense counsel objected, however, asserting that voluntary manslaughter was not a lesser included offense of murder under Ohio law. At that time, *State v. Toth*, 52 Ohio St. 2d 206 (1977) stated that an element of voluntary manslaughter to be proved by the prosecutor beyond a reasonable doubt was extreme emotional distress. Subsequent to petitioner's trial, however, the Ohio Supreme Court refused to follow its decision in *Toth* and held that extreme emotional distress is not an element of voluntary manslaughter but rather is a mitigating factor. *State v. Muscatello*, 55 Ohio St. 2d 201 (1978).

Based on this case law, petitioner asserts that she was compelled to object to the trial court's proposed voluntary manslaughter instruction.

The trial court adhered to petitioner's objection and did not give the instruction concerning voluntary manslaughter. No objection was made by the defendant that such instruction should have been given. Petitioner now asserts, however, that the trial court erred in failing to instruct the jury concerning the lesser included offense of voluntary manslaughter.

The petitioner asserts that there exists a due process right to have the jury instructed on lesser included offenses, citing *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the Court stated:

> In federal courts it has long been beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.
>
> . . . .
>
> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Id. at 635, 637. The Court went on to hold "if the unavailability of a lesser included instruction enhances the risk of an unwarranted conviction, Alabama is *constitu-*

tionally prohibited from withholding the option from the jury *in a capital case.*" Id. at 638. (emphasis added).

The Court does not find that the *Beck* case stands for the proposition that due process requires a lesser included offense instruction in all cases where there exists a risk of an unwarranted conviction. *Beck* was a case dealing with capital punishment in which the Court recognized "as we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments." Id. at 637. The Seventh Circuit, however, has recently held that an allegation that the trial court failed to give a *tendered* voluntary manslaughter charge denies due process, states a cognizable habeas corpus claim. *David v. Greer*, 675 F.2d 141 (1982); *See also Brewer v. Overberg*, 624 F.2d 51, 52 (6th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981). Before dealing with this issue of whether the petitioner was denied the right to a fair trial, the Court finds that the "cause and prejudice" principles of *Wainwright v. Sykes*, 433 U.S. 72 (1977), are applicable.

In light of the fact that the petitioner did not object to the failure of the trial court to instruct on voluntary manslaughter and that the petitioner requested that such instruction not be given, the petitioner must show both "cause and prejudice" for her default in failing to object on the basis of this constitutional claim. *Engle v. Isaac*, —— U.S. —— 102 S.Ct. 1558 (1982). The Court rejects the petitioner's claim that the "cause" for her default in failing to request a voluntary manslaughter claim was the posture of Ohio law under *State v. Toth*, *supra*. In *Engle v. Isaac*, *supra*, the Court states:

> We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not by-pass the state courts simply because he thinks

> they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive state courts of this opportunity would contradict the principles supporting *Sykes*.

Id. at 1572-1573. As pointed out by the Magistrate, the petitioner should have been aware, at the time of her trial, of the argument in favor of requiring the trial court to instruct on a lesser included offense. Indeed, the court of appeals in *State v. Muscatello*, 57 Ohio App. 2d 231 (1977) *aff'd* 55 Ohio St. 2d 201 (1978), had already accepted this argument. Instead of asserting this argument, however, the petitioner objected when such an instruction was proposed by the trial court. The Court finds, therefore, that no "cause" exists for petitioner's failure to request an instruction on the lesser included offense of voluntary manslaughter.

III. *Voir Dire of Potential Jurors Regarding The "Battered Wife Syndrome."*

The petitioner asserts that it is imperative to a fair trial to uncover juror biases against battered wives and self-defense. She asserts, therefore, that it was error for the court to prevent such voir dire questioning.

The scope and procedure followed in the voir dire examination of prospective jurors is a question of state procedural law. *Ohio R. of Crim. P.* 24(A). As pointed out by the Magistrate, this Court is bound by a state court's interpretation of its own procedural rules. *Brewer v. Overberg*, 624 F.2d 51 (6th Cir. 1980), *cert. denied*, 449 U.S. 1085 (1981). Further, petitioner has not proffered any substantial indications of the likelihood of prejudice so as to elevate this claim to "constitutional dimensions." *Cf. Rosales-Lopez v. United States*, 451 U.S. 182 (1981). We cannot find, therefore, that the trial court abused its discretion in controlling the

voir dire examination of potential jurors in violation of the federal constitution.

IV. *Prosecutor's Suppression of Favorable Evidence.*

Finally, the petitioner asserts that she has been denied due process on the basis that the prosecutor has failed to disclose exculpatory evidence. The petitioner asserts the following: 1) in a motion for discovery, she requested that the prosecutor disclose all favorable evidence; the prosecutor responded by providing the petitioner with a list of witnesses it intended to call; specifically, the prosecutor listed as witnesses William Sanders and Ernestine Chambliss; these two witnesses were not called by petitioner allegedly for two reasons: (a) their reliability was questionable because they were listed on the prosecutor's witness list, and b) Sanders was under indictment; during closing argument the prosecutor commented about petitioner's failure to call these two witnesses; finally, the petitioner learned that the two witnesses provided police with written statements which included exculpatory evidence. Based on this information, the petitioner filed a motion for a new trial. A hearing was held on this matter and the trial court denied the motion concluding that no miscarriage of justice occurred inasmuch as the petitioner had access to the exculpatory information prior to trial. Petitioner now asserts that this writ should be granted under the authority of *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972).

Reviewing the transcript of the hearing on the motion for a new trial, the trial court was presented with a credibility choice. Witness Sanders testified that he mentioned to defense counsel before trial that he had given a written statement to the police. Also, an assistant prosecutor testified that the subject-matter statements were contained in materials that were turned over to de-

fense counsel pursuant to the trial court's pretrial discovery order. Defense counsel, however, testified that he first became aware of these statements after trial. The trial court made its credibility choice in favor of the prosecutor concluding that these statements could have been discovered and produced at trial with reasonable diligence.

Under authority of *Sumner v. Mata*, 449 U.S. 539 (1981), this Court must presume that this finding is correct unless the petitioner can establish the existence of one of seven circumstances. In this case, the petitioner neither asserts nor establishes the existence of any of the circumstances outlined in *Sumner v. Mata*, *supra* at 544-545. The Court also finds that the trial court's finding regarding this credibility choice is fairly supported by the record. *Id.* Further, the Court finds that based on this finding, due process was not violated in that the petitioner received a fair trial. The petitioner had an opportunity to discover and present said exculpatory evidence to the jury. *See Smith v. Phillips*, —— U.S. ——, 102 S.Ct. 940, 946-948 (1982).

CONCLUSION

Upon review of the entire record *de novo*, as well as the Magistrate's report and recommended disposition, the Court finds that an evidentiary hearing is not necessary and that petitioner's claims for habeas corpus relief are without merit. Accordingly, the Court hereby denies the petition of Kathy Thomas for a writ of habeas corpus.

IT IS SO ORDERED.

[September 3, 1982]

/s/ Leroy J. Contie, Jr.
LEROY J. CONTIE, JR.
U.S. Circuit Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Title Omitted]

JUDGMENT ENTRY

Having determined that Kathy Thomas' petition for habeas corpus relief is without merit, the Court hereby

ORDERS, ADJUDGES, and DECREES that judgment is entered in favor of the respondent and against the petitioner.

[September 3, 1982]

/s/ Leroy J. Contie, Jr.
LEROY J. CONTIE, JR.
U.S. Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3095

KATHY THOMAS, PETITIONER-APPELLANT

v.

DOROTHY ARN, RESPONDENT-APPELLEE

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern District

Decided and Filed March 9, 1984

Before: MERRITT and JONES, *Circuit Judges*; and JOHNSTONE, District Judge *

JOHNSTONE, District Judge, delivered the opinion of the Court, in which MERRITT, Circuit Judge, joined. JONES, Circuit Judge, (p. 4) filed a separate concurring opinion.

OPINION

JOHNSTONE, District Judge. Petitioner, Kathy Thomas, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241 for post conviction relief from her Ohio murder conviction for the death of her common law husband,

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* Honorable Edward Johnstone, United States District Court Judge for the Western District of Kentucky, sitting by designation.

Reuben Daniels. At her trial, Thomas alleged that she shot him in self defense. The evidence at trial established that the decedent was a violent man who had beaten Thomas on a number of occasions, including just before the shooting. In support of her defense, Thomas attempted to offer the testimony of a social worker as an expert witness on "battered wife syndrome." The trial court voir dired the witness, found him unqualified, and held his testimony inadmissable.

On appeal, the Ohio Court of Appeals reversed Thomas's conviction on this issue; however, this ruling was overturned by the Ohio Supreme Court and her conviction reinstated. *State* v. *Thomas*, 17 O.Op.2d 397 (Ohio App. 1980), *reversed*, 66 O.St.2d 518 (Ohio 1981). Thomas exhausted all state relief before filing her petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division.

Thomas's petition was referred to a magistrate under 28 U.S.C. § 636(b)(1)(B). The magistrate filed his report and recommended that the petition be denied on May 11, 1982. Title 28 of the United States Code, Section 636(c), provides that Thomas had ten days within which to file written objections, if any, to the magistrate's report. Thomas, represented by counsel, filed a motion for an extension of time to file objections to the report. The motion was granted and Thomas given until June 15, 1982. Thomas, however, filed no objections. On September 3, 1932, the district court, Contie, J., considered the record *de novo* and the recommendation of the magistrate. The court denied the petition of Thomas for a writ of habeas corpus on the same ground enunciated by the magistrate. From this judgment Thomas filed a timely notice of appeal.

Jurisdiction over the parties and subject matter is appropriate pursuant to 28 U.S.C. § 2241. The court, however, faces the threshold issue raised by the respondent of whether Thomas waived her right to appeal due to her

failure to file objections to the report and recommendation of the magistrate.

In *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981), this court held that ". . . a party shall file objections [to a magistrate's report] with the district court or else waive right to appeal." *Id.* at 950. *But see Britt* v. *Simi Valley Unified School District*, 708 F.2d 453, 454 (9th Cir. 1983). The holding in *Walters*, announced over a year before the report in this case was filed, was given prospective application, and accordingly, is applicable to this action. As required by *Walters*, the report at issue here contained a warning to the parties that failure to file objections within ten days would result in a waiver of the right to appeal the judgment of the district court.

Careful examination of the record reveals that Thomas failed to file written objection to the report and recommendation of the magistrate that her habeas corpus petition be dismissed by the district court. Under such circumstances, Thomas waived further appeal as compelled by this court's interpretation of 28 U.S.C. § 636(b)(1) in *United States* v. *Walters*, 638 F.2d 947. Accordingly, the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, dismissing this petition for a writ of habeas corpus is AFFIRMED.

JONES, Circuit Judge, concurring. I concur in the outcome of this case because, as the majority concludes, *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981) bars Kathy Thomas' right to appeal. I write separately to note that if I were to reach the merits of this case I would grant the writ of habeas corpus. In my view, the trial court's exclusion of expert testimony on the "battered wife syndrome" impugned by fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial. *Mannino* v. *International Manufacturing Co.*, 650 F.2d 846 (6th Cir. 1981); *Bell* v. *Arn*, 536 F.2d 123 (6th Cir. 1976). There is sufficient literature which suggests that the public and thus, juries, do not understand the scope of the problem concerning battered women. *See, e.g., Report From the Attorney General & Task Force on Domestic Violence* (1978). Furthermore, they tend to be unsympathetic toward battered women. They fail to understand, for instance, why battered women do not leave their partners. Ascertaining a battered woman's state of mind is crucial to a determination of this and other aspects of her behavior. It may bear on the responsibility or lack of it, for her response. In my opinion the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge. The law cannot be allowed to be mired in antiquated notions about human responses when a body of knowledge is available which is capable of providing insight.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-3095

KATHY THOMAS, PETITIONER-APPELLANT

v.

DOROTHY ARN, RESPONDENT-APPELLEE

ORDER DENYING PETITION FOR REHEARING

Before: MERRITT and JONES, Circuit Judges; and JOHNSTONE,* District Judge

Upon consideration of the petition for rehearing filed herein by the petitioner-appellant, the Court concludes that the question addressed in the petition for rehearing was fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Court

[June 25, 1984]

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* The Honorable Edward Johnstone, United States District Court Judge for the Western District of Kentucky, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. 84-5630

KATHY THOMAS, PETITIONER

v.

DOROTHY ARN, ADMINISTRATOR, WOMEN'S CORRECTIONAL ADMISSION CENTER

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

ON CONSIDERATION of the motion for leave to proceed herein forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 4, 1985

Justice Powell took no part in the consideration or decision of this motion and petition.

PETITIONER'S

BRIEF

No. 84-5630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KATHY THOMAS,

Petitioner,

-vs-

DOROTHY ARN, Superintendent, Ohio Reformatory for Women,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

1. Whether a United States Court of Appeals may, consistent with either the allocation of constitutional authority in Articles I and III or legislation governing the role of magistrates, adopt a rule precluding appeal from conclusions of law when an appellant did not file objections to a magistrate's report and recommendation?

2. Whether a United States Court of Appeals rule precluding appeal from conclusions of law when an appellant has failed to file objections to a magistrate's report and recommendation violates the due process clause of the Fifth Amendment?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	6
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Boddie v. *Connecticut*, 401 U.S. 371 ('971)	14-15
Cameron v. *Secretary of Army*, No. 81-1484 (6th Cir. Apr. 20, 1983)	11
Campbell v. *United States District Court*, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 879 (1974)	9
Cohens v. *Virginia*, 6 Wheat. 264 (1821)	6
Colorado River Water Conserv. Dist. v. *United States*, 424 U.S. 800 (1976)	7-8
Douglas v. *California*, 372 U.S. 353 (1963)	14
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	16
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)	16
Lorin Corp. v. *Goto & Co., Ltd.*, 700 F.2d 1202 (8th cir. 1983)	8, 15
Martin v. *Hunter's Lessee*, 1 Wheat. 304 (1816)	6
Mathews v. *Weber*, 423 U.S. 261 (1976)	9, 11, 12
Nettles v. *Wainwright*, 677 F.2d 404 (5th Cir. 1982)	11
Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)	12
Pacemaker Diagnostic Clinic of America v. *Instromedix*, 725 F.2d 537 (9th Cir. 1983) (en banc)	10
Park Motor Mart, Inc. v. *Ford Motor Co.*, 616 F.2d 603 (1st cir. 1980)	14
Stanley v. *Illinois*, 405 U.S. 645 (1972)	15
State v. *Thomas*, 66 Ohio St. 2d 518 (1981)	1
Sumner v. *Mata*, 449 U.S. 539 (1981), reaff'd, 455 U.S. 591 (1982)	16
Stutler v. *Secretary, HHS*, No. 82-1733 (6th Cir. Jun. 1, 1984)	7
United States v. *Raddatz*, 447 U.S. 667 (1980)	9, 12, 13
United States v. *Sherwood*, 312 U.S. 584 (1941)	7
United States v. *Walters*, 639 F.2d 947 (6th Cir. 1981)	7, 11
Whitehead v. *Califano*, 596 F.2d 1315 (6th Cir. 1979)	13
Wilcox v. *Consolidated Gas Co.*, 212 U.S. 19 (1909)	8

Table of Authorities Continued

	Page
Wingo v. *Wedding*, 418 U.S. 461 (1974)	14
CONSTITUTIONS, STATUTES AND RULES	
U.S. Const. art. I	1, 12, 13, 14
U.S. Const. art. III	*passim*
U.S. Const. amend. V	2, 17
28 U.S.C. § 636(b)(1)(A)	2, 10
28 U.S.C. § 636(b)(1)(B)	9
28 U.S.C. § 636(b)(1)(C)	*passim*
28 U.S.C. § 636(c)	2, 10
28 U.S.C. § 1291	3, 14
28 U.S.C. § 2101	1
28 U.S.C. § 2253	3, 7
Fed. R. App. 1	7
N.D. Ohio Local R. 19.04(3)	3, 4
N.D. Ohio Local R. 19.08(3)	3, 4

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's Motion for Rehearing is unreported and reproduced in the (J.A. 65). The decision of that court rejecting the appeal of the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, is reported at 728 F.2d 813 (6th Cir. 1984), and reproduced in the (J.A. 60).

The decision of the district court denying the petition for a writ of habeas corpus is unreported and is reproduced in the (J.A. 51). The Report and Recommendation of the magistrate recommending denial of the writ is also unreported and reproduced in the (J.A. 37).

The decision of the Ohio Supreme Court reinstating Petitioner's conviction is reported at *State* v. *Thomas*, 66 Ohio St. 2d 518 (1981), and is reproduced in the (J.A. 33). The decision of the Eighth District Ohio Court of Appeals reversing Petitioner's conviction is reported at 17 Ohio Op. 2d 397 (1980). The judgment of the Cuyahoga County Court of Common Pleas finding the Petitioner guilty of murder is unreported and is reproduced in the (J.A. 9).

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Motion for Rehearing was entered on June 25, 1984. A timely petition for a writ of certiorari was subsequently granted by this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 2101.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS EXCERPTS

United States Constitution, Article I, Section 8: The Congress shall have power . . . to constitute tribunals inferior to the Supreme Court.

United States Constitution, Article III, Section 1: The judicial power of the United States shall be vested . . . in such inferior courts as the Congress may from time to time ordain and establish.

United States Constitution, Amendment V: No person shall . . . be deprived of life, liberty, or property, without due process of law, ...

United States Code, Title 28, Section 636(b)(1)(A): A judge may designate a magistrate to hear and determine any [non-dispositive] pretrial matter pending before the court, ... A judge of the court may reconsider any pretrial matter under subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

United States Code, Title 28, Section 636(b)(1)(C): Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

United States Code, Title 28, Section 636(c)(4); (5): Notwithstanding the provisions of paragraph (3) of this

subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court. . . . [Such c]ases . . . may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment.

United States Code, Title 28, Section 1291: The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

United States Code, Title 28, Section 2253: In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

Federal Rules of Appellate Procedure, Rule 1(b): These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

Local Rules of Northern District of Ohio, Rule 19.04(3): An aggrieved party may object to the Magistrate's proposed findings, recommendation or report issued under this rule within ten (10) days after being served with a copy thereof.

Local Rules of Northern District of Ohio, Rule 19.08(3): Objections to a Magistrate's report and recommendation with regard to a dispositive civil motion and all proceedings thereafter shall be in accordance with Rule 19.04(3).

STATEMENT OF THE CASE

Having exhausted her state appellate remedies, Petitioner Kathy Thomas sought a writ of habeas corpus based on the exclusion at trial of expert testimony on the "battered wife syndrome." A lengthy memorandum of

law was filed in support of the habeas petition, and the District Court referred the petition to a magistrate.

No evidentiary hearing was held before the magistrate. The central issue of the petition was whether "the trial court's exclusion of expert testimony on the 'battered wife syndrome' impugned the fundamental fairness of the trial process thereby depriving Thomas of her constitutional right to a fair trial." *Thomas* v. *Arn*, 728 F.2d 813, 815 (6th Cir. 1984) (Jones, J., concurring).

Based on the memoranda of law and state court decisions, the magistrate filed a report and recommendation that the petition be denied on May 11, 1982. The magistrate's report contained a warning that failure to file objections within ten days would result in a waiver of the right to appeal the judgment of the district court. Undersigned counsel for Kathy Thomas secured an extension of time in which to file objections.

After reviewing the magistrate's report and recommendation, undersigned counsel determined that further briefing of the legal issues would have been repetitive and serve no useful purpose. No objections were filed, nor was waiver of the appeal as of right discussed with Kathy Thomas. The warning in the magistrate's report had not registered with undersigned counsel as a bar to an appeal on the conclusions of law drawn by the magistrate.

Local rules in the United States District Court for the Northern District of Ohio, Eastern Division, are permissive in relation to the filing of objections. N.D. Rule 19.04(3); 19.08(3). Likewise, the Magistrates Act, 28 U.S.C. § 636(b)(1)(C), contains permissive language. Undersigned counsel neither noticed nor understood the warning to be in contravention of the local rules and governing statute.

Even without objections being filed, the district judge considered the record *de novo* and, on September 3, 1982, denied the habeas petition on the same grounds used by the magistrate. A timely appeal from that final order was made to the United States Court of Appeals for the Sixth Circuit.

The court deemed the appeal as of right to be waived by failure to file objections to the magistrate's report and recommendation. Absent that waiver, at least one judge on the panel would have granted the writ of habeas corpus.

That judge concluded that "the expert testimony could have clarified the unique psychological state of mind of the battered woman and should have been admitted by the trial judge" to overcome the jury's lack of sympathy and inability or failure to understand the syndrome. *Thomas* v. *Arn*, 728 F.2d at 815 (6th Cir. 1984) (Jones, J., concurring). Kathy Thomas had been trapped in the battered woman syndrome: "The evidence at trial established that the decedent was a violent man who had beaten Thomas on a number of occasions, including just before the shooting." 728 F.2d at 814.

She was nevertheless indicted for murder. At arraignment she plead not guilty. At trial she admitted killing her common law husband, but she contended that the killing was in self defense. The expert testimony was to be elicited on her state of mind.

Due to the waiver rule established by the United States Court of Appeals for the Sixth Circuit, she has been denied an appeal as of right on whether exclusion of that expert testimony violated her constitutional guarantee to a fair trial.

SUMMARY OF ARGUMENT

In appeals involving conclusions of law, the rule in the United States Court of Appeals for the Sixth Circuit operates to reduce appellate jurisdiction by precluding an appeal when the appellant has failed to file objections to a magistrate's report and recommendation. That rule is flatly in conflict, therefore, with the constitutional allocation to Congress of power to establish the jurisdiction of the federal courts inferior to this Court.

Moreover, the rule contradicts both the express language of the congressional allocation of jurisdiction to magistrates and the legislative scheme governing the relationship of magistrates to Article III judges and appeals. Indeed, through its rule, the United States Court of Appeals for the Sixth Circuit installs a magistrate in the position of an Article III judge despite the magistrate's Article I stature.

Beyond that, the rule impairs the only federal appeal as of right without a countervailing interest being narrowly served and creates two groups of appellants who are indistinguishable on the merits of the cases and irrationally treated differently. Thus, the rule violates due process and the equal protection component of the Fifth Amendment.

ARGUMENT

1. Power To Reduce Appellate Jurisdiction Resides Exclusively In Congress.

Article III allocates to Congress the power to set the appellate jurisdiction of federal courts inferior to this Court. Since *Martin* v. *Hunters' Lessee*, 1 Wheat. 304 (1816), and *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821), congressional delineation of inferior federal court jurisdiction has been controlling.

In turn, the Federal Rules of Appellate Procedure explicitly bar any construction of the Rules "to extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b). However much power Congress has conferred on courts to enact procedural rules, no legislative authority flows "to enlarge or diminish the jurisdiction of [the] federal courts." *United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941).

Congress has established a clear right to an appeal from the denial of a writ of habeas corpus. 28 U.S.C. § 2253. Nevertheless, the United States Court of Appeals for the Sixth Circuit has enacted a rule precluding jurisdiction over such an appeal when objections have not been filed to adverse conclusions of law and other findings by a magistrate on the habeas corpus petition. *United States* v. *Walters*, 639 F.2d 947 (6th Cir. 1981).

In an appeal where issues of law predominate, the rule inevitably operates as a jurisdictional barrier. Rather than limit the scope of appeal in such cases, the rule effectively denies any meaningful appeal.

The jurisdictional nature of the rule's bar is likewise clear. In *Stutler* v. *Secretary of HHS*, No. 82-1733 (6th Cir. Jun. 1, 1984) (not recommended for full-text publication), an apparently tardy filing of objections to a Magistrate's Report recommending summary judgment was treated by the appellate court as a jurisdictional issue: "At this juncture it is imperative for this court to determine whether the plaintiff filed a timely objection to the magistrate's report as such is a predicate to the jurisdiction of this court to review the appellant's appeal."

This conclusion disregards "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist.* v.

United States, 424 U.S. 800, 817-18 (1976). *Accord*, *Wilcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) (duty of appellate court to exercise jurisdiction given by Congress).

An appellate decision on a close question of law was totally denied Petitioner. The constitutional ramifications of exclusion of expert testimony on battered women were at the heart of the appeal and patently reflected conclusions of law reached by both the magistrate and the trial judge. To foreclose an appeal on issues of law properly raised below under the guise of a procedural rule is an arrogation of jurisdictional power in contravention of Article III.

II. The Statutory Language And Structure Of The Magistrates Act Refute Claimed Legislative Authorization For A Barrier To Appeal Based On A Failure To File Objections To A Magistrate's Report.

The express language Congress used in referring to objections to a magistrate's report and recommendation is permissive. "Within ten days . . ., any party *may* serve and file written objections to such proposed findings and recommendations. . . ." 28 U.S.C. § 636(b)(1)(C) (emphasis noted).

Of equal importance, no mention is made of the impact of failing to file objections on the right to an appeal. As the court in *Lorin Corp.* v. *Goto & Co., Ltd.*, 700 F.2d 1202, 1206 (8th Cir. 1983), reasoned, "One would think that if Congress had wished such a drastic consequence to follow from the missing of the ten-day time limit, it would have said so explicitly."

To the contrary, Congress set in no uncertain terms precisely what relationship the magistrate's report and recommendation has to the trial judge. Pursuant to 28

U.S.C. § 636(b)(1)(C), the trial "court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." The Act does not set a condition precedent of objections; instead, "[t]he district judge is free to follow it or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew." *Mathews* v. *Weber*, 423 U.S. 261, 271 (1976).

Conversely, Congress exacted a penalty for failure to file objections. A "de novo determination" is triggered by objections. 28 U.S.C. § 636(b)(1)(C). Quite simply, the effect of a failure to file objections is the waiver of a *mandatory* de novo determination. *Cf. United States* v. *Raddatz*, 447 U.S. 667, 676 (1980) (de novo requirement set by Congress to ensure review by trial court).

The legislative history is similarly clear: parties who object have a right to a more rigorous standard of review than is available to non-objecting parties. H. Rep. 94-1609, 94th Cong. 2d Sess. (1976), reprinted in, 1976 U.S. Code Cong. & Admin. News at 6163.

Indeed, the legislative history negates any inference that a different, more drastic penalty exists. In 1976, § 636(b)(1)(B) of the Magistrates Act was amended to clarify "the type of review afforded a party who takes exceptions" to a magistrate's report and recommendation. *Id.* The amendment was explicitly adopted to codify the holding in *Campbell* v. *United States District Court*, 501 F.2d 196, 206 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974), that "[i]f neither party contests the Magistrate's proposed findings of fact, the court may assume their correctness and decide the motion of the applicable law." Thus, Congress clearly intended that the district judge fully review legal issues even though objections were not filed.

A review of the legislative scheme in the Magistrates Act also demonstrates that Congress did not intend to penalize a failure to object with waiver of an appeal as of right. Pursuant to 28 U.S.C. § 636(b)(1)(A), a trial judge must review a magistrate's determination of even nondispositive matters upon a standard of "clearly erroneous or contrary to law." For nondispositive and post-trial matters, Congress supplemented this standard of review at the option of a party to increase the district judge's supervision of the magistrate.

The entire thrust of the Magistrates Act is, therefore, to increase the standard of review when dispositive or post-trial matters are handled by the magistrate. Thus, there can be no waiver of all review by the trial judge and, accordingly, no waiver of an appeal as of right.

Under the rule at bar, the effect of a failure to file objections is far different than congressionally intended: loss of the right to an appeal. Yet, Congress chose to limit that appeal right under different and stringent standards.

Pursuant to 28 U.S.C. § 636(c), parties may consent to trial by a magistrate and then may *choose* whether to waive their appeal as a matter of right to a circuit court. 28 U.S.C. § 636(c)(4). Litigant consent and choice are integral to the statutory framework and avoidance of constitutional shoals. *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537, 542-43 (9th Cir., 1983) (en banc). That Congress erected safeguards to ensure that parties freely and fully consent prior to any magistrate's decision strongly argues against any legislative intent to transform a failure to object into post-trial consent to waive appeal.

Interposed against this array of congressional intent is the notion adopted by the Sixth Circuit that the magistrate system demands waiver to effectuate a general statutory purpose to streamline district court decisionmaking. *See, e.g., United States* v. *Walters*, 639 F.2d 947 (6th Cir. 1981); *Nettles* v. *Wainwright*, 677 F.2d 404 (5th Cir. 1982).

To ignore specific language and structure in the name of pursuing a greater legislative purpose is, however, in conflict with fundamental canons of statutory interpretation. Moreover, the empirical observation of efficiency is a matter for the legislature, not the courts, to act upon.

Indeed, the efficacy of requiring objections to conclusions of law when the objections mirror the arguments made to the magistrate is surely questionable. *See Cameron* v. *Secretary of the A[illegible]*, No. 81-1484 (6th Cir., Apr. 20, 1983) (not recommended for full-text publication) (a blanket objection to the magistrate's report or recommendation is inadequate to preserve the right to appeal). In any event, the district court decisionmaking process is not streamlined when parties are forced to file objections that they deem unnecessary.

Besides, even absent objections a magistrate functions to focus the attention of the trial judge and provide a preliminary evaluation of the merits. *Mathews* v. *Weber*, *supra*, 423 U.S. at 271. Were a party satisfied that the magistrate's report and, though not the recommendation, fairly reflects the contending legal and factual issues, forcing objections to be filed would be burdensome on both the party and the district judge who is thereby required to perform a duplicative de novo determination.

Moreover, when a district court does fully review findings of fact and conclusions of law, the statutory purpose has been fulfilled. At bar, the trial judge exercised his discretion to engage in a de novo review, though he could

have refused to do so in light of the failure to file objections. Thus, the effect of the waiver of de novo determination, the only waiver attached by the Magistrates Act to failure to file objections, was vitiated by the district court. Under the Magistrates Act, the waiver cannot be resurrected by the appellate court.

III. Legislation Interpreted To Penalize A Failure To File Objections By Waiver Of An Appeal As Of Right Violates The Article III Requirement Of An Independent Judiciary.

This Court has recently encountered legislative efforts to vest in non-Article III judges the exercise of Article III judicial power. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The role of magistrates has likewise been questioned. *See, e.g., United States* v. *Raddatz, supra; Mathews* v. *Weber, supra.*

A common thread throughout the jurisprudence on the exercise of Article III power by non-Article III judges is the role of the Article III judge as the constitutional backstop. In *Mathews* v. *Weber, supra*, 423 U.S. at 271, this Court so responded to the argument that Congress had improperly converted the Article I magistrate: "The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge."

Canvassing legislative history, the Court found that Congress shared the fear that Article I magistrates would exercise Article III power. To calm that fear, Congress ensured that the Article III judge retained the ultimate responsibility for matters referred to the magistrate. 423 U.S. at 269-70.

In a like manner, the Court explained in *United States* v. *Raddatz, supra*, 447 U.S. at 681, that "the entire process takes place under the district court's total control and jurisdiction." The critical element in meeting an Article III challenge based on the requirement of an independent judiciary, then, is active and ultimate participation of an Article III judge.

Were 28 U.S.C. § 636(b)(1)(C) construed to impose a penalty of loss of an appeal as of right for failure to file objections to a magistrate's report and recommendation, the Article I magistrate would be elevated to the position of an Article III judge. Rather than service as an adjunct to the Article III judge, the Article I magistrate would take on independent importance. It would be the magistrate's report and recommendation that an aggrieved party must object to, not the judge's final order, for an appeal to be perfected.

An Article I magistrate may not, however, assume such a role. Judicial power must reside in the Article III judge and, without prior constraints, can neither be abdicated to nor conclusively exercised by an Article I magistrate.

The Magistrates Act implemented a system whereby non-Article III judges could deal with the often time-consuming and peripheral issues that delay merits decisions. Absent very specific and limited circumstances, magistrates were not intended to issue merits decisions. Congress has not equated the Article I magistrate with an Article III judge.

Consequently, an appeal turns on the district judge's order, not the magistrate's report and recommendations. *Whitehead* v. *Califano*, 596 F.2d 1315, 1319 n.3 (6th Cir. 1979)(Magistrate's Report not a final order). A final order

appealable under 28 U.S.C. § 1291 flows from judicial power, and that judicial power has Article III's guarantee of independence.

In appealing from a final order entered by an Article III judge, a party has satisfied 28 U.S.C. § 1291. An interpretation of 28 U.S.C. § 636(b)(1)(C) that effectively transmits finality to the magistrate's report and recommendation deprives a party of Article III protection. *See Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980).

By filing the appeal, a party had clearly indicated an unwillingness to waive the right to active and ultimate participation by an Article III judge. No waiver can be implied under a constitutionally construed statute from a party's failure to file objections to an Article I magistrate's report and recommendation.

IV. A Rule Compelling That Objections Be Filed To A Magistrate's Report To Preserve An Appeal As Of Right Violates Due Process.

Whatever the source for a rule conditioning an appeal as of right on objections being filed to a Magistrate's Report, the rule must be adopted in a manner consistent with the Fifth Amendment. Two branches of the Amendment's due process clause are implicated by such a rule.

First, the rule directly and severely impairs a fundamental right. The constitutional pedigree of the writ of habeas corpus has been recognized by this Court. *Wingo* v. *Wedding*, 418 U.S. 461, 468 (1974). The function of an appeal as of right in preserving that writ is equally apparent. *See Douglas* v. *California*, 372 U.S. 353 (1963).

Absent some countervailing interest, due process demands that the fundamental right not be impaired. *Bod-*

die v. *Connecticut*, 401 U.S. 371 (1971). The only countervailing interest, however, is that trial judges might be able to more efficiently review magistrate reports.

That efficiency is not demonstrably served by a rule requiring objections. A trial judge would be able to most expeditiously review a magistrate's report when no challenge is made to it. For that matter, a perfunctory set of objections, perhaps incorporating the very same ones made to the magistrate with regard to the original petition, is of no utility.

Professionalism and self-interest constitute ample motivation for filing meaningful objections. *Lorin Corp.*, *supra*, 700 F.2d at 106. No reason exists to force a habeas corpus petitioner to fully brief the legal questions first in state courts and then before the magistrate and finally waste the time, effort, and money to reargue the same questions before the trial judge.

Once an issue, especially a legal issue, is raised before the magistrate, it should be properly raised for purposes of appeal. A party ought not be characterized as abandoning a legal argument fully briefed before the magistrate. The trial judge has a full record, consisting in part of a petition, prior briefs and judicial decisions, and the magistrate's report and recommendation on the legal issues, before him or her and is in no way bypassed when a party does not file objections.

Beyond that, this kind of argument from efficiency is too reminiscent of that rejected in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), to withstand scrutiny. Governments may always find it more efficient to burden citizens; the due process clause stands as a bulwark against that.

Indeed, the burden is particularly inappropriate in habeas corpus proceedings. Findings of fact made by

state courts are open to minimal challenge in a habeas corpus proceeding. *Sumner* v. *Mata*, 449 U.S. 539, 550 (1981), *reaff'd*, 455 U.S. 591 (1982). Thus, most habeas corpus petitions focus on legal issues, like the one at bar.

Moreover, the status of habeas corpus petitioners, usually indigent inmates proceeding *in forma pauperis*, renders the burden even more unseemly. Lawyers are forced to needlessly waste time, energy, and money despite the presence of fully briefed legal issues. Similarly, the trial judge is not significantly more informed by repetitive objections than he or she already was by the initial memorandum of law in support of the habeas corpus petition.

Second, the rule operates to create two groups of appellants without regard to the merits of the appeals. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), an administrative rule with similar effect was found by six members of this Court to violate equal protection.

To justify treating Petitioner's ostensibly meritorious appeal differently from other appeals, the rule asserts efficiency, a matter addressed in the due process branch, and waiver. Waiver should not be inferred from a reasonable response to the notice provided Petitioner's counsel. In light of the established distinction between findings of fact and conclusions of law and the previous legal memorandum on the issues of law at bar, that notice was simply ineffectual to induce waiver of an appeal as of right.

Under *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), a waiver must be intentional, knowing, and voluntary. Kathy Thomas in no way made such a waiver. Undersigned counsel has diligently pursued her case through six courts and should not be held to have waived her appeal as of right by operation of the warning in the magistrate's

report. Absent waiver, no countervailing interest exists to justify denial of Kathy Thomas' only federal appeal as of right.

CONCLUSION

The judge-made rule denying an appeal as of right from a district court final order impermissably limits the jurisdiction of inferior federal courts, ignores the plain meaning of the Magistrates Act and congressional intent, and violates the constitutional safeguards in Article III and the Fifth Amendment. Petitioner respectfully requests that this Court reverse and vacate the judgment of the United States Court of Appeals for the Sixth Circuit and remand for a full appellate review of the district court's denial of the writ of habeas corpus.

Respectfully submitted,

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RESPONDENT'S

BRIEF

CASE NO. 84-5630

In The Supreme Court of the United States

OCTOBER TERM, 1984

KATHY THOMAS

Petitioner,

v.

DOROTHY ARN, Superintendent,
Ohio Reformatory for Women,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER, CONSISTENT WITH THE FEDERAL MAGISTRATES ACT, A CIRCUIT COURT MAY CONDITION APPELLATE REVIEW UPON THE FILING OF OBJECTIONS TO THE RECOMMENDATION OF THE MAGISTRATE.

PARTIES

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court, all parties to this action are listed in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i
PARTIES ii
OPINIONS BELOW. 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE. 7
SUMMARY OF ARGUMENT. 14
ARGUMENT

Consistent With The Federal Magistrates Act, a Circuit Court May Condition Appellate Review Upon The Filing Of Objections To The Report Of The Magistrate 15

CONCLUSION 33
CERTIFICATE OF SERVICE. 33

TABLE OF AUTHORITIES

Page

Cases:

Britt v. Simi Valley School District,
708 F.2d 452 (9th Cir. 1983) 16

Buhrle v. State,
697 P.2d 1374 (Wyo. 1981) 32

Camby v. Davis,
719 F.2d 198 (4th Cir. 1983) 15

Campbell v. United States District Court,
501 F.2d 196 (9th Cir. 1974) 22

Clark v. Ueberee Finanz-Korporation,
332 U.S. 480 (1947) 26

Cupp v. Naughten,
414 U.S. 141 (1973) 27

Engle v. Issac,
456 U.S. 107 (1982) 8, 28, 32

Haas v. State,
103 Ohio St. 1, 132 N.E. 158 (1921) 8

Hormel v. Helvering,
312 U.S. 552 (1941) 26

Ingram v. Richardson,
471 F.2d 1268 (6th Cir. 1972) 17

Jackson v. Virginia,
443 U.S. 307 (1979) 30

John B. Hull, Inc. v. Waterbury Petroleum Products Inc., 588 F.2d 24 (2nd Cir. 1978) 15

Keener v. Ridenour,
594 F.2d 581 (6th Cir. 1979) 28

Link v. Wabash Railroad Co.,
370 U.S. 626 (1962) 27

Lorin Corp. v. Goto & Co.,
700 F.2d 1202 (8th Cir. 1983) 16

Mathews v. Weber,
423 U.S. 261 (1979) 16, 25

TABLE OF AUTHORITIES *cont'd*

Page

McCall v. Andrus,
628 F.2d 1185 (9th Cir. 1980) 16

McCarthy v. Mason,
714 F.2d 234 (2nd Cir. 1983) 15, 28

Messimer v. Lockhart,
702 F.2d 729 (8th Cir. 1983) 16

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 27

Nettles v. Wainwright,
677 F.2d 404 (5th Cir. 1982) (en banc) (Unit B) 16, 30

Park Motor Mart, Inc. v. Ford Motor Co.,
616 F.2d 603 (1st Cir. 1980) 15, 22

Patterson v. Mintzes,
717 F.2d 294 (6th Cir. 1983) 28

Singleton v. Wulff,
428 U.S. 106 (1976) 26

State v. Robbins,
58 Ohio St. 2d 74, 388 N.E. 2d 755 (1979) 14

State v. Smith,
247 Ga. 612, 277 S.E. 2d 678 (1981) 32

State v. Thomas,
17 Ohio Ops. 397 (1980) 1, 8

State v. Thomas,
66 Ohio St. 2d, 423 N.E. 2d 137 (1981) 1, 8

State v. Thomas,
13 Ohio App. 3d 211, 468 N.E. 2d 763 (1983) 32

Thomas v. Arn,
728 F.2d 813 (6th Cir. 1984) 1, 12

T.P.O. v. McMillan,
460 F.2d 348 (7th Cir. 1972) 17

United States v. Frady,
456 U.S. 152 (1982) 28

TABLE OF AUTHORITIES *cont'd*

Page

United States v. Lewis,
621 F.2d 1382 (5th Cir. 1980) 15
United States v. Raddatz,
447 U.S. 667 (1980) 21, 26
United States v. Schronce,
727 F.2d 91 (4th Cir. 1984) 15
United States v. Walters,
638 F.2d 947 (6th Cir. 1981) 12, 16, 27, 28
Wingo v. Wedding,
418 U.S. 461 (1974) 17

Statutes:
28 U.S.C. Section 604(d)(4) 25
28 U.S.C. Section 636(b) 2, 10, 21
28 U.S.C. Section 636(c)(3) 29
28 U.S.C. Section 1254(1) 1
28 U.S.C. Section 2253. 27
28 U.S.C. Section 2254. 9
Ohio Revised Code Section 2903.02 7

Rules:
Rule 8(b), Rules Governing Section 2254 Cases
in the United States District Courts. 3, 10
Rule 72, Federal Rules of Civil Procedure. 4

Miscellaneous Authorities:
Hearings on the Jurisdiction of United States Magistrates, before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. (1975) 18, 21, 25

TABLE OF AUTHORITIES *cont'd*

Page

H.R. Rep. No. 94-1609 (1976), reprinted in,
U.S. Code Cong. & Admin. News 1976,
p. 6163 . . . . . ,21, 22
Annual Report of the Director of the Administrative Office of the United States Courts (1980). 29
Annual Report of the Director of the Administrative Office of the United States Courts (1983). 29

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported as *Thomas v. Arn*, 728 F. 2d 813 (6th Cir. 1984). (JA-61)[1] The decision of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported. (JA-51). The report and recommendation of the United States Magistrate is unreported. (JA-37). The decision of the Supreme Court of Ohio is reported as *State v. Thomas*, 66 Ohio St. 2d, 423 N.E. 2d 137 (1981). (JA-32a). The decision of the Ohio Court of Appeals for the Eighth Judicial District is reported as *State v. Thomas*, 17 Ohio Ops. 397 (1980). (JA-9).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was issued on March 9, 1984 and the order denying rehearing was issued on June 25, 1984. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

The petition for writ of certiorari was filed on September 20, 1984. Certiorari was granted by order of March 4, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

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[1]References to the Joint Appendix of this brief are designated as "JA."

> SECTION 1. All persons born or naturalized in the United States, and subject ot the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves 28 U.S.C. Section 636(b) which provides in pertinent part:

> (1) Notwithstanding any provision of law to the contrary—
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including

evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

The case also involves Rule 8 of the Rules Governing Section 2254 Cases In The United States District Courts which provides in pertinent part:

(B) Function of the Magistrate—

(1) When designated to do so in accordance with 28 U.S.C. Section 636

(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

The case also involves Rule 72 of the Federal Rules of Civil Procedure which provides:

(a) NONDISPOSITIVE MATTERS. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. The district judge to whom the case is assigned shall consider objections made by

the parties, provided they are served and filed within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(b) DISPOSITIVE MOTIONS AND PRISONER PETITIONS. A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being

served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

CASE NO. 84–5630

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KATHY THOMAS

Petitioner,

v.

DOROTHY ARN, Superintendent,
Ohio Reformatory for Women,

Respondent.

STATEMENT OF THE CASE

Petitioner Kathy Thomas was indicted by the January 1978 Term of the Cuyahoga County, Ohio, Grand Jury on one count of murder in violation of Ohio Revised Code Section 2903.02[2] The indictment stemmed from the shooting death of petitioner's common-law husband. Subsequent to jury trial, petitioner was found guilty as charged. Petitioner was sentenced to a term of from fifteen (15) years to life imprisonment.[3]

Petitioner perfected a timely appeal as of right to the Ohio Court of Appeals for the Eighth Judicial District. In a split decision, the intermediate appellate court held that the trial court had erred in excluding testimony con-

[2]The Ohio murder statute provides that "[n]o person shall purposely cause the death of another."

[3]In an unrelated proceeding, petitioner was convicted of trafficking in drugs. That conviction in not, however, challenged herein.

cerning the psychological characteristics of battered women. The appellate court reversed and remanded for a new trial. *State v. Thomas,* 17 Ohio Ops. 3rd 397 (1980). (JA-9).

The Supreme Court of Ohio thereafter granted discretionary review. The sole issue raised by the prosecution on appeal was "whether the trial court committed reversible error by excluding testimony on the subject of the 'battered wife syndrome' by an expert on battered wives, where defendant pleaded self-defense to killing her husband". (JA-33). In an unanimous opinion, the Court held that:

> Expert testimony on the "battered wife syndrome" by a psychiatric social worker to support defendant's claim of self-defense is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

State v. Thomas, 66 Ohio St. 2d 518, 423 N.E. 2d 137 (1981) (syllabus by the court)[4] (JA-32a). In addition to the general proposition of law contained in the syllabus, the Court embraced the appellate court dissenting opinion by stating:

[4]"In Ohio, the court's syllabus contains the controlling law." *Engle v. Isaac,* 456 U.S. 107, 111 n. 3 (1982), citing *Haas v. State,* 103 Ohio St. 1, 7-8, 132 N.E. 158, 159-160 (1921).

The cogent dissenting opinion in the Court of Appeals of Judge Blanche Krupansky in this case succinctly sets forth eight reasons for the proper exclusion of such expert testimony about the "battered wife syndrome" as follows:

1. There was no proper proffer of expert testimony.
2. Appellant's [Defendant's] expert had no personal contact with appellant.
3. No hypothetical question was propounded to appellant's expert witness.
4. There was no determination that appellant was in fact a battered woman.
5. Analysis of the issues raised was within the realm of the jury.
5. The trial court's jury charge more than adequately covered the situation.
7. There was no prejudice to appellant.
8. The trial court did not abuse its discretion. 66 Ohio St. 2d at 519 n. 1. (JA-32b).

The Supreme Court of Ohio thus reinstated petitioner's murder conviction.

Petitioner, through counsel,[5] thereafter filed a petition for writ of habeas corpus pursuant to 28 U S.C. Section 2254 with the United States District Court for the Northern District of Ohio, Eastern Division. Therein, petitioner asserted four (4) grounds for habeas corpus relief. By order, then District Judge Leroy Contie, Jr.,[6]

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[5]Both in the state and the federal judiciary, petitioner has at all times been represented by the same attorney.

[6]During the pendency of the district court action, Judge Contie was appointed to the United States Court of Appeals for the Sixth Circuit.

referred the matter to United States Magistrate Charles R. Laurie for preparation of a report and recommendation pursuant to the requisites of 28 U.S.C. Section 636(b)(1) and Rule 8(b) of the Rules Governing Section 2254 Cases In The United States District Courts. (Docket Entry 4, JA-1). Relevant portions of the state court record, including the almost two thousand page trial transcript, were thereafter filed and reviewed by the Magistrate in conjunction with the briefs of the parties.

On May 11, 1982, the Magistrate issued a report and recommendation which recommended that the petition for writ of habeas corpus be dismissed. (JA-37). The Magistrate's report and recommendation contained the following prominent admonition and warning:

> ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See: *United States v. Walters,* 638 F. 2d 947 (6th Dir. 1981). (JA-50).

The parties were served with copies of the Magistrate's report and recommendation. On May 24, 1982, petitioner filed a motion for an extension of time in which to file objections to the Magistrate's report and recommendation. (Docket Entry 12, JA-2). On May 28, 1982, Judge Contie issued an order granting petitioner an extension through June 15, 1982 in which to file objections. However, almost three (3) months passed and petitioner neither filed objections nor otherwise indicated that any objections would be forthcoming.

On September 3, 1982, Judge Contie *sua sponte* issued an order finding petitioner's claims to be without merit and dismissing the petition. (JA-51). Therein, Judge Contie reviewed the chronology of events and stated:

> By Order this Court referred this matter to a United States Magistrate for his report and recommendation on July 29, 1981. The Magistrate filed his report and recommended disposition on May 11, 1982. The Magistrate recommends that Kathy Thomas' petition be denied with regard to all four listed grounds for relief. The petitioner filed a motion for extension of time to file objections to the Magistrate's report and recommendation. This motion was granted and the petitioner was given until June 15, 1982. The petitioner, however, has failed to file objections. (JA-51).

A judgment entry dismissing the action was filed on September 3, 1982. (JA-60). On November 1, 1982, petitioner filed a "motion for leave to file notice of appeal". (Docket Entry 17, JA-2). The motion was granted by District Judge David Dowd by order dated November 24, 1982. (Docket Entry 18, JA-2). Petitioner filed a notice of appeal on February 2, 1983. (Docket Entry 20, JA-2).

Petitioner's appeal was thereafter docketed in the United States Court of Appeals for the Sixth Circuit. Petitioner filed a brief which presented only one of the four (4) claims that had been asserted in her habeas corpus petition, i.e., that the state trial court had erred

in refusing to allow the testimony of a social worker as an expert witness on "battered wife syndrome". Respondent's brief raised two separate and distinct issues. Respondent initially argued as a threshold matter that the unexplained failure of petitioner to comply with the express notice contained in the Magistrate's report and recommendation constituted a waiver of appeal as enunciated in the circuit court's opinion in *United States v. Walters,* 638 F. 2d 947 (6th Cir. 1981). Respondent secondarily argued that petitioner's sole substantive claim was not cognizable in a federal habeas corpus action as it, at most, presented an evidentiary question wholly within the province of the state judiciary. Petitioner did *not* file a reply brief or otherwise address the waiver issue.

The Court of Appeals subsequently issued a notice of oral argument to counsel for the parties. Petitioner's attorney, however, informed the circuit court that he would not be in attendance at the oral argument. Consequently, oral argument was not held and the appeal was decided on the briefs. The Court of Appeals was thus afforded neither written nor oral explanation for petitioner's failure to file objections as mandated by the warning contained in the Magistrate's report and recommendation.

On March 9, 1984, the Court of Appeals issued an opinion affirming the lower court judgment. *Thomas v. Arn,* 728 F. 2d 813 (6th Cir. 1984). The circuit court stated its rationale as follows:

> Jurisdiction over the parties and subject matter is appropriate pursuant to 28 U.S.C. Section 2241. The court, however, faces the threshold issue raised by the respondent of whether Thomas waived

her right to appeal due to her failure to file objections to the report and recommendation of the magistrate.

In *United States v. Walters,* 638 F. 2d 947 (6th Cir., 1981), this court held that ". . .a party shall file objections [to a magistrate's report] with the district court or else waive right to appeal." *Id.* at 950. *But see Britt v. Simi Valley Unified School District,* 708 F. 2d 453, 454 (9th Cir. 1983). The holding in *Walters* announced over a year before the report in this case was filed, was given prospective application, and accordingly, is applicable to this action. As required by *Walters,* the report at issue here contained a warning to the parties that failure to file objections within ten days would result in a waiver of the right to appeal the judgment of the district court. 728 F. 2d at 814-815. (JA-62).

Petitioner thereafter filed a petition for rehearing. As the sole justification for having failed to adhere to the warning contained in the Magistrate's report and recommendation, petitioner's attorney stated that "[c]ounsel is the one who screwed up." (Petition for Rehearing at page 4). No elaboration was given. By order dated June 25, 1984, the Court of Appeals denied rehearing. (JA-65). This Court granted petitioner's ensuing petition to a writ of certiorari by order dated March 4, 1985. (JA-66).

The facts which gave rise to petitioner's murder conviction have been exhaustively chronicled in the various opinions of both the state and federal judiciary. Petitioner admitted to having killed her common-law husband by shooting him once in the forehead and once in the arm. Petitioner, however, claimed that the shooting was in self defense. Evidence admitted at trial was indicative of physcial abuse inflicted upon petitioner through the course of their stormy three year relationship. At trial, petitioner testified that she shot her common-law husband because he was coming toward her and she was in grave fear. In statements made at the scene of the crime, however, petitioner told police officers that she and the victim had argued about burned fish and a pawn ticket. He then shoved her down on a couch and walked away and sat down in a chair. Petitioner related to the officers that she then picked up a gun, walked over to the couch, and stated "I've had enough." She then shot him twice as he sat in the chair. While petitioner's trial testimony was consistent with self defense under Ohio law, the version of the events recounted at the crime scene clearly were not. See *State v. Robbins,* 58 Ohio St. 2d 74, 388 N.E. 2d 755 (1979). The jury apparently credited that account of the activity made more contemporaneously to the events themselves.

SUMMARY OF ARGUMENT

Congress enacted the Federal Magistrates Act as a response to the massive increase in the caseload of the federal judiciary. Magistrates were empowered to issue dispositive rulings in cases subject to the proviso that a party could obtain de novo review by a district judge *if* the litigant filed timely objections to those portions of the Magistrate's proposed disposition to which the litigant took objection. Congress thus intended to maximize the assistance which Magistrates could provide in reducing congested dockets while accomodating Article III concerns by providing litigants the *opportunity*

to obtain de novo review. This system would aid district judges by either disposing of the litigation in its entirety or, upon the filing of specific objections, narrowing the scope of the parties' dispute.

A reversal of the judgment below would defeat the congressional intent underlying the Federal Magistrates Act by permitting a litigant to essentially appeal an adverse Magistrate's recommendation directly to a Court of Appeals. Such holding would simply shift the primary Article III oversight function from the district courts to the appellate courts. Morever, upon the facts of the instant case, a reversal by this Court would erode the inherent supervisory power of a circuit court to sanction an unexplained refusal to comply with the court's directive.

ARGUMENT

The question presented in this case is whether a United States Court of Appeals may, consistent with the Federal Magistrates Act, condition appellate review of a district court judgment upon the filing of objections to a report and recommendation issued by a United States Magistrate. The question is one which has divided the circuit courts. With slight variations,[7] the First, Second, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits have held that the failure to file objections to a Magistrate's report and recommendation results in the waiver of appellate consideration. See, respectively, *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F. 2d 603 (1st Cir. 1980); *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.* 588 F. 2d 24 (2nd Cir. 1978), *McCarthy v. Manson*, 714 F. 2d 234 (2nd Cir. 1983); *United States v. Schronce*, 727 F. 2d 91 (4th Cir. 1984), *Camby v. Davis*, 719 F. 2d 198 (4th Cir. 1983); *United States v. Lewis*,

[7] Some circuits make a distinction between appellate review of factual determinations versus that of legal conclusions. Others emphasize the need for an express notice to the litigants as to the consequence of the failure to file objections.

621 F. 2d 1382 (5th Cir. 1980); *United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981); *McCall v. Andrus*, 628 F. 2d 1185 (9th Cir. 1980); *Britt v. Simi Valley School District*, 708 F. 2d 452 (9th Cir. 1983); *Nettles v. Wainwright*, 677 F. 2d 404 (5th Cir. 1982) (en banc) (Unit B) (now the United States Court of Appeals for the Eleventh Circuit). The Eighth Circuit has held to the contrary. *Lorin Corp. v. Goto & Co.*, 700 F. 2d 1202 (8th Cir. 1983); *Messimer v. Lockhart*, 702 F. 2d 729 (8th Cir. 1983). The issue is of national significance as reversal of the judgment below would be tantamont to a declaration that disaffected litigants may, in effect, appeal an adverse Magistrate's report and recommendation directly to a Court of Appeals. Such result would both defeat the stated purposes of the Federal Magistrates Act and markedly increase the caseloads of what are already congested circuit court dockets. An examination of congressional intent, coupled with considerations of long standing rules of appellate practice, dictates an affirmance of the judgment of the Court of Appeals below.

I. The Legislative History Of The Federal Magistrates Act Demonstrates That The Failure To File Objections To A Magistrate's Report And Recommendation Constitutes A Waiver Of Further Review.

"After several years of study, the Congress in 1968 enacted the Federal Magistrates Act." *Mathews v. Weber*, 423 U.S. 261, 267 (1976). The Act abolished the office of United States Commissioner and created a new echelon of the federal judiciary. The Act was prompted by a congressional recognition that a massive increase in the caseload of the federal courts mandated either a dramatic increase in Article III judgeships or the establishment of a system of non-Article III judicial officers who

could assist their Article III counterparts. The 1968 Act was, however, met with a series of adverse judicial decisions which severely limited the authority of Magistrates and concommittedly impeded their ability to assist Article III judges. See, e.g., *Wingo v. Wedding,* 418 U.S. 461 (1974) (Magistrates held unable to conduct evidentiary hearings in habeas corpus cases); *T.P.O. v. McMillan,* 460 F. 2d 348 (7th Cir. 1972) (Magistrates held unable to hear dispositive motions in civil cases); *Ingram v. Richardson,* 471 F. 2d 1268 (6th Cir. 1972) (Magistrates held unable to make proposed findings of fact and conclusions of law in social security cases). Faced with such decisions, Congress accepted the challenge of the Chief Justice and Justice White when they stated ". . .it is now for the Congress to act to restate its intentions if its declared objectives are to be carried out." *Wingo v. Wedding,* 418 U.S. at 487. (dissenting opinion). This language prompted the 1976 Amendments to the Federal Magistrates Act.

Extensive congressional hearings were thereafter held. Input was received from a variety of sources including the Judicial Conference of the United States, the Administrative Office of the United States Courts, and a substantial number of federal judges. In hearings held on S. 1283, Subcommittee Chairman Senator Burdick stated:

> In hearings held by this subcommittee on the Omnibus District Court Judgeship bill in the last Congress, the chief judges of 44 of the 94 Federal judicial districts personally appeared and testified before the subcommittee.
>
> The overwhelming majority of the chief judges who testified stated that the magistrates were of great assistance to the court in handling certain pretrial matters in both civil and criminal cases and were of the greatest assistance to the court in handling petitions brought by prisoners from both State and Federal institutions.

Hearings on the Jurisdiction of United States Magistrates before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. p. 1 (1975) (hereinafter Senate Hearings). As initially introduced S. 1238 would have amended 28 U.S.C. Section 636(b) to read as follows:

> (b)(1) Notwithstanding any provision of law to the contrary, a judge may designate a magistrate to hear and determine, subject to review as hereinafter provided, any pretrial matter pending before the court except motions which are dispositive of the litigation, the disposition of which the magistrate may recommend, but not order. A judge may also designate a magistrate to conduct evidentiary hearings and make recommendations for the disposition of applications for post trial relief made by individuals convicted of criminal offenses and prisoner petitions challenging conditions of confinement. Upon timely request, as fixed by local rule of court, by any party who has appeared before the magistrate, either personally or by submissions of affidavits or brief, the court shall hear de novo those portions of the report or specific proposed findings of fact or conclusions of law to which objection is made.

Subsequent to conference with representatives of the Judicial Conference of the United States, Amendment No. 589 was accepted and S. 1238 was altered to read as follows:

> (b)(1) Notwithstanding any provision of law to the contrary
> (A) a judge may designate a magistrate to hear and determine, any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant to suppress evidence in a criminal case, dismiss or to permit maintenance of a class action, and to involuntarily dismiss an action for failure to prosecute or for failure to comply with an order of the court. A judge of the court may rehear any pretrial matter under the subsection where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subsection (A), of applications for post-trial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) of this subsection with the clerk of the court, who shall forthwith mail a copy to all parties. Within twenty days after being served with notice of the filing, any party may serve and file written objections to such proposed findings and recommendations together with a motion applying to the court for action on such proposed findings and recommendations. The motion shall be determined by a judge of the court who may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

The amendment simply clarified the distinction between a Magistrate's authority to adjudicate non-dispositive versus dispositive matters. With respect to non-dispositive matters, a Magistrate was empowered to make a final determination subject only to a "clearly erroneous or contrary to law" standard of review by the district court judge upon objection of a party. In the context of dispositive matters, a Magistrate was empowered to issue only proposed findings of fact and conclusions of law. *If* a party filed objections to the proposed disposition, it was incumbent upon the district court judge to conduct a de novo review. Congress thus afforded litigants the *opportunity* to obtain review anew by the district judge. Congress was keenly aware of perceived Article III problems and, when S. 1238 was forwarded to the House, the House Judiciary Committee clarified the Senate intentions by adding the "de novo determination"

language presently in 28 U.S.C. Section 636(b). *United States v. Raddatz,* 447 U.S. 667, 674-675 (1980), citing H.R. Rep. No. 94-1609 (1976) reprinted in, U.S. Code Cong. & Admin. News 1976, p. 6163. The Congress thus intended to give Magistrates the maximum allowable authority to aid the district judge in the ultimate disposition of cases while, at the same time, accommodating Article III concerns by providing litigants the *opportunity* for "a de novo determination of those portions of the report or specified proposed findings or recommendations *to which objection is made.*" 28 U.S.C. Section 636(b)(1)(c). (emphasis added). The rationale was that objections would be made infrequently, thus disposing of the litigation in its entirety, or that objections would be made to only a portion of the Magistrate's report, thereby narrowing the scope of the dispute for determination by the district judge. Drawing upon the experience of the English system, the Judicial Conference of the United States stated:

> By requiring that a district judge conduct a *de novo* hearing on any specific objection raised by any party, proposed subsection (b)(1) may well generate some duplication of effort in a particular case. However, the experience to date on the use of magistrates in several United States district courts and the report of the role of masters in the English courts are persuasive that there will be, overall, a considerable savings of the time of district judges, since objections will normally be made only in a relatively few instances. Senate Hearings, p. 37.

Petitioner cites a reference in the House Report to the decision in *Campbell v. United States District Court,* 501 F. 2d 196 (9th Cir. 1974) for the proposition that "Congress clearly intended that the district judge fully review legal issues even though objections were not filed." This precise argument was considered and rejected by the circuit court in *Park Motor Mart, Inc. v. Ford Motor Co.,* 616 F. 2d 603 (1st Cir. 1980). Therein, the circuit court correctly reasoned as follows:

> Basically, the dispute between the parties centers upon the effect of the phrase "may serve and file written objections." Defendants assert that a party may decide not to file, but that filing is obligatory if he is dissatisifed. Plaintiffs' position is that the district court has a duty to review the magistrate's recommendations in any event, and that the losing party need file objections only if he wishes a hearing.
>
> * * *
>
> Next, and most important, we see in the succeeding sentence, which states that "the court shall make a de novo determination" with respect to matters "to which objection is made," no implication that the court must also do so with respect to matters to which objection is *not* made. Applying the basic principle that, presumably, there is some purpose for all language used, there could be no reason for mandating a redetermination when objections are filed if the court had to do so whether objections were filed or

not. This seems a typical case of *expressio unius est exclusio alterius See United States v. MBTA*, 614 F.2d 27, 1 Cir., 1980.

Neither can it be said that if objection is made there will be a redetermination de novo, but if none is made there should still be a review, but of a lesser character. A lesser standard of review, "clearly erroneous or contrary to law," is explicitly provided for in subsection (b)(1)(A) cases. *See* ante. The absence of such a provision here seems a speaking silence.

Turning to the general purpose of the statute, we see no reason for implying an obligation to review when a review has not been requested. The purpose of the Federal Magistrates Act is to relieve courts of unnecessary work. Since magistrates are not Article III judges, it is necessary to provide for a redetermination by the court, if requested, of matters falling within subsection (b)(1)(B). To require it if not requested would defeat the main purpose of the Act. It is not burdensome on the parties to require such a request. We conclude that a party "may" file objections within ten days or he may not, as he chooses, but he "shall" do so if he wishes further consideration.

Finally, we have reviewed the legislative history, but see no point in discussing it in detail. We do not consider a single sentence, contained in a long quotation in 1976 U.S. Code. Cong. & Admin. News,

> pp. 6162, 6163, from *Campbell v. United States Dist. Court,* 9 Cir., 1974, 501 F.2d 196, 206, *cert. denied,* 419 U.S. 879, 95 S.Ct. 143, 42 L.Ed.2d 119, "If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law," as contradicting our conclusions herein. 616 F.2d at 604-605. (footnote omitted).

The resolution of the First Circuit is fully supported by the legislative history of the 1976 Amendments. In explaining the operation of the statute, District Judge Metzner, Chairman of the Judicial Conference Committee on the Administration of the Federal Magistrates System, testified as follows:

> When you are talking about magistrates, you are talking about people within the system, within the very same building. I can best give you an example as to how we do it to show you how simple it is.
>
> Copies of the magistrate's report are simultaneously sent to the judge and to counsel by the magistrate. That report has a concluding paragraph in it which says that if you have any objections to this report, you shall file them with the court within ten days.
>
> These papers are then taken by my secretary and held for 12 days. We do not hold them to the strict 10-day rule. If any objections come in, she brings the

> papers in to me and I review them and decide it. If no objections come in, I merely sign the magistrate's order.
>
> It is as simple as that. Senate Hearings, p. 11.

The Administrative Office of the United States Courts, the statutory body that supervises the administrative aspects of the Federal Magistrates Act pursuant to 28 U.S.C. Section 604(d)(1), reads the Act the same way. That Office stated:

> Where a magistrate submits a report or recommendation to a judge, the parties should receive copies of the report and recommendation.
> The parties shall be allowed a reasonable time within which to raise specific objections to the report and recommendation.
> Where a magistrate makes a finding or ruling on a motion or an issue, his determination should become that of the district court, unless specific objection is filed within a reasonable time. Senate Hearings, p. 24.

The interpretation of the Administrative Office is not without significance. *Mathews v. Weber,* 423 U.S. at 272 n. 7.

Of prime import, is that the interpretation urged by petitioner would wholly frustrate the very purpose of the 1976 Amendments. Congress sought to maximize the assistance provided to district judges without running afoul of Article III proscriptions. To that end, Congress provided that Magistrates could rule on dispositive

motions subject to the proviso that a litigant was afforded the *opportunity* to obtain a de novo determination *if* the party exercised the option to do so. The legislation clearly anticipated that Magistrates would issue recommendations in a variety of contexts where pure "factual" issues are wholly absent, i.e., a motion to dismiss for failure to state a claim upon which relief can be granted. To argue that Congress, absent objections to the Magistrate's recommended disposition, intended to require a district judge to sua sponte redetermine such legal conclusions is to pervert the legislative history and defeat the Congressional intent of the 1976 Amendments. As stated in a similar context, this Court should not "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *United States v. Raddatz,* 447 U.S. 676 n. 3 (1980), citing, *Clark v. Ueberee Finanz-Korporation,* 332 U.S. 480, 489 (1947).

II. A Federal Court Of Appeals May, Consistent With General Principles Of Appellate Procedure And Its Inherent Supervisory Powers, Decline To Review Issues On Appeal Which Were Waived By An Unexplained Failure To File Objections With The Federal District Court Where The Party Seeking To Raise Such Issues Was Afforded Express Notice Of The Consequences Of Such Procedural Default.

It is a well established rule that a Court of Appeals will not consider an issue which was not preserved for review in the lower court. *Singleton v. Wulff,* 428 U.S. 106, 120 (1976); *Hormel v. Helvering,* 312 U.S. 552 (1941). It is equally well established that a Court of

Appeals is vested with inherent supervisory authority to require compliance with "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Cupp v. Naughten,* 441 U.S. 141, 146 (1973). Moreover, the unexplained disobediance of a judicial warning or order such as that contained in the Magistrate's report in the instant case warrants appropriate sanction where the court has given a litigant notice of the consequences of his refusal to comply. See, generally, *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1962); *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976). While any one of the aforementioned factors compels affirmance of the judgment below, the instant case presents a flagrant violation of all three principles.

Petitioner's contention that the court below failed to exercise its jurisdiction or has otherwise erected a "jurisdictional barrier" to that jurisdiction conferred by Congress pursuant to 28 U.S.C. Section 2253 is simply untenable. The circuit court in *United States v. Walters, supra.,* expressly stated that the decision was premised "through the exercise of our supervisory power." 638 F.2d at 950. Moreover, the opinion herein upon review specifically state that "[j]urisdiction over the parties and subject matter is appropriate pursuant to 28 U.S.C. Section 2241." *Thomas v. Arn,* 728 F.2d at 814. (JA-62). The action of the court below was predicated upon an unexplained procedural default rather than an unlawful refusal to exercise its appellate jurisdiction. That a Court of Appeals has jurisdiction over the subject matter of a habeas corpus appeal does not in all instances mean that the appellate court should resolve a substantive issue

which has been forfeited by procedural default.[8] Compare, *Engle v. Isaac,* 456 U.S. 107 (1982). Finally, petitioner's purported reliance upon an unreported opinion of the United States Court of Appeals for the Sixth Circuit is unfounded as that court itself has expressly held that such unreported decisions are without precedential value. *Keener v. Ridenour,* 594 F.2d 581, 588-589 (6th Cir. 1979).

Petitioner's due process argument is equally unavailing. The warning contained in the Magistrate's report could not have more clearly or simply given specific notice of the consquences which would attend upon a failure to file objections.[9] Petitioner's blithe assertion that the warning "had not registered . . . as a bar to appeal" is nothing short of sheer sophistry. No equal protection concerns exist as the rule applies equally to any litigant who seeks review of a Magistrate's report. See, e.g., *McCarthy v. Manson,* 714 F.2d 234 (2nd Cir. 1983) (rule applied against the State of Connecticut in a habeas corpus proceeding).

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[8]Such is not to state that a rule of procedural default should in every case prove inflexible. The Sixth Circuit has itself excused the failure to file timely objections upon a showing of cause and in order to prevent manifest injustice. See *Patterson v. Mintzes,* 717 F.2d 284 (6th Cir. 1983). This Court has likewise considered and promulgated standards of review in cases of procedural default. *United States v. Frady,* 456 U.S. 152 (1982). Here, the court below was not so much as afforded a proffer of any cause for the procedural default.

[9]Indeed, the court in *United States v. Walters, supra,* was sensitive to any arguable due process concerns and expressly held that the rule would apply only prospectively and only where the litigant was afforded specific notice such as that given herein. 638 F.2d at 950.

Reversal of the judgment below would be tantamount to a declaration that a party dissatisfied with a Magistrate's recommended disposition may by-pass the oversight function of an Article III district judge and appeal directly to a federal circuit court. Such a ruling would be contrary to law as Congress has provided for such appeals only in narrow circumstances which are not herein presented. See 28 U.S.C. Section 636(c)(3). Moreover, such a holding would have a devastating impact upon the already over-burdened dockets of the Courts of Appeals. The Annual Report of the Director of the Administrative Office of the United States Courts (1980) (hereinafter Annual Report) reflects that in the year ending June 30, 1980, Magistrates handled 283,217 total matters. Annual Report, p. 10. Magistrates issued a report and recommendation pursuant to the provisions of 28 U.S.C. Section 636(b)(1) in 11,578 prisoner petitions,[10] 4,213 social security cases, 5,810 other civil "dispositive" matters and 1,485 criminal "dispositive" matters. Annual Report, p. 120. The number of prisoner petitions filed in the district courts increased 37.3 percent from 1975 to 1980. Annual Report, p. 62. In 1980, 23,200 appeals were filed in the Courts of Appeals amounting to a 14.7 percent increase over appeals filed in 1979 and a nearly 100 percent increase over those filed in 1970. In contrast, the number of authorized circuit court judgships increased only 36 percent in that same ten year period. Annual Report, p. 1. In 1980, prisoner petition appeals constituted 11.5 percent of the total appeals in the Courts of Appeals.[11] Of primary

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[10] In the year ending June 30, 1983, the number of Magistrates' recommendations issued in prisoner cases increased to 18,543. Annual Report, p. 198 (1983 Edition.).

[11] In 1983, prisoner petition appeals actually increased to 16.3 percent of the overall circuit court filings. Annual Report, p. 102, (1983 Edition.).

import is the unequal distribution and disparate impact of prisoner petition appeals. Such appeals ranged from an almost incredible 38.9 percent of the total filings in the Fourth Circuit to less than 1 percent of filings in the District of Columbia. A remarkable 56.3 percent of all prisoner petition appeals were concentrated in the Fourth, Fifth (now the Fifth and Eleventh) and Sixth Circuit Courts of Appeals. Annual Report, p. 46. It is noteworthy that these circuits which are most affected have all embraced the waiver principle which is the subject of the instant controversy. This Court has itself had occasion to remark upon the strain placed upon the circuit court judges faced with an ever increasing influx of prisoner appeals. *Jackson v. Virginia,* 443 U.S. 307, 338, n. 13 (1979) (dissenting opinion).

The Federal Magistrates Act was in large measure intended to serve as a filtration system designed to narrow the scope of litigation and thus more clearly delineate the issues in dispute. These policy considerations were perhaps best summarized in *Nettles v. Wainwright,* 677 F. 2d 404 (5th Cir. 1982) (en banc) (Unit B) wherein the fully assembled court unanimously stated:

> It is arguable that, when no objections are filed, the parties have accepted the magistrate's report and have consented to his recommendations. If a party has objections, it is essential that he apprise the district court. Judicial efficiency and the objectives of the Magistrates Act dictate that the district judge must be aware of any objections to the report in order to properly comply with the duties under section 636(b)(1)(B).

Furthermore, no undue burden exists in requiring an attorney or a pro se litigant to state his objections, if any, to the district court. We are not asking a litigant to give up his right to appeal, only to perfect it. We note that attorneys are officers of the court and are, therefore, in some part implicitly responsible for the efficient operation of the judicial system. Requiring them to assist the district court by stating their objections is a small order. It is even smaller when weighed against the consequences to their clients (or themselves if pro se) of having the circuit court refuse to entertain their arguments on appeal based on error in the magistrate's report. We will not sit idly by and observe the "sandbagging" of district judges when an appellant fails to object to a magistrate's report in the district court and then undertakes to raise his objections for the first time in this court.

It is reasonable to place upon the parties the duty to pinpoint those portions of the magistrate's report that the district court must specially consider. This rule facilitates the opportunity for distirct judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act. 677 F.2d at 409-410. (footnotes omitted).

The waiver doctrine enunciated by the court below is in full accord with the purposes underlying the Federal

Magistrates Act. Petitioner was given an express warning of the consequences which would attend upon disobedience of the court's admonition. Given petitioner's wholly unexplained failure to comply, the court below clearly had inherent authority to enforce the procedural requisite.

III. The Constitution Does Not Demand That A State Permit Testimony Regarding The "Battered Wife Syndrome"

"A petition for writ of habeas corpus should be dismissed if it merely attaches a constitutional label to factual allegations that do not describe a violation of any constitutional right." *Engle v. Isaac,* 456 U.S. at 136 (Stevens J., concurring). Such is the case with petitioner's substantive claim. The Due Process Clause does not serve as a license whereby the federal judiciary may substitute its judgment regarding evidentiary rules upon a state judiciary. Under our system of federalism, mere evidentiary questions, e.g., the admission of polygraph results, are issues solely relegated to the states. The various jurisdictions are in disagreement as to whether testimony regarding the "battered wife syndrome" should be admissible. See, e.g., *Buhrle v. State,* 697 P.2d 1374 (Wyo. 1981); *State v. Smith,* 247 Ga. 612, 277 S.E. 2d 678 (1981). Such divergence is not, however, uncommon. The State of Ohio does, in fact, provide for the admission of expert testimony concerning the unique state of mind of an abused woman in a self defense context where such testimony is offered by an examining psychiatrist. See *State v. Thomas,* 13 Ohio App. 3d 211, 468 N.E. 2d 763 (1983). That Ohio does not permit the testimony of a social worker who has never met with the accused does not violate a federally secured right and is thus not properly the subject of habeas corpus petition.

CONCLUSION

For all the aforementioned reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief for Respondent has been forwarded to petitioner, Kathy Thomas, through the office of her counsel, Christopher D. Stanley, Attorney at Law, 902 Rockefeller Building, Cleveland, Ohio, 44113, via the U.S. mail, the _____ day of June, 1985. I further certify that all parties required to be served has been served. Petitioner's address is the Ohio Reformatory for Women at Marysville, Ohio.

RICHARD DAVID DRAKE
Assistant Attorney General